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800
No. 2235

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.
(In Three Volumes.)

STANDARD PORTLAND CEMENT CORPORATION, a Corporation,

Plaintiff in Error,

VS.

ERNEST E. EVANS, GEORGE COLEMAN, and
PERCY W. EVANS, Partners Doing Business Under
the Firm Name of EVANS, COLEMAN AND
EVANS,

Defendants in Error.

VOLUME III.

(Pages 673 to 1064 Inclusive.)

Upon Writ of Error to the United States District Court of
the Northern District of California, Second Division.

FILED

FEB 3 - 1913

Records of U. S. Circuit
Court of appeal
800

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the Northern District of California, Second Division.

[**Testimony of John L. Howard, for Complainant
(Recalled—Cross-examination).**]

JOHN L. HOWARD was recalled for further cross-examination, and thereupon testified as follows, to wit:

Mr. OLNEY.—Q. Mr. Howard, I read to you a list of the directors of the Northwestern Portland Cement Company, as follows: W. C. Webb, Edwin Schwab, R. M. Sims, R. M. Moore, A. F. Morrisson, [467—152] L. F. Young, William J. Dingee, Irving A. Bachman, William M. Cannon, D. A. McLeod, and J. E. Riordian, and ask you if any of these men had ever been shareholders or officers of either the Western Fuel Company or the Western Building Material Company.

A. Never. None of these men with the exception of Mr. Dingee and Mr. Bachman had ever had any relations or affiliations with me and Mr. Dingee and Mr. Bachman have simply had the relations with me to which I have already testified.

Redirect Examination.

I mean that to apply to Garrett W. McEnerney, I never did any business with him; and also to L. F. Young, excepting just as he happened to be in the office—I never did any business with him. When Mr. Olney spoke in the way he did, I supposed he meant business associations or affiliations. I think the only business of these cement companies of any importance that I have transacted with Mr. L. F. Young was when he came down to approve the unpaid bills that the cement companies owed us. I

(Testimony of John L. Howard.)

would meet him in the office of course, and pass the time of day with him, but all my business has been with Mr. Dingee. Mr. Young may have been at the table when I lunched with Mr. Dingee. I lunched several times with Mr. Dingee. Mr. Young may have negotiated some of these acceptances on behalf of the cement companies. The arrangements or acceptances were all fixed by us with Mr. Dingee. Mr. Young may have been the errand boy to come and get them. That was practically all. I never had any relations with Mr. William N. Cannon. I think I have only seen him once in my life. There are not present any negotiations proceeding between myself and Mr. William N. Cannon with respect to the possible rehabilitation of the Northwestern Portland Cement Company—I have no relations with Mr. Cannon.

Mr. BROBECK.—We have been endeavoring to locate two letters, the copies of which are in the record as attached to Mr. Howard's deposition. Those copies having been taken from certain carbons which Mr. Evans furnished us. The letters were written, first, under the date of February 10, 1908, to Mr. Howard and the second under date of March 4, 1908, to Mr. Howard. I have asked counsel to go through the correspondence in their possession and ascertain whether they could find those letters. We have ourselves gone through their correspondence, under their permission, to endeavor to find those letters but we have been unable to find them. I would like to ask counsel for Messrs. Evans, Coleman & Evans, whether they have been

(Testimony of John L. Howard.)

able to locate them.

Mr. OLNEY.—I will say that we have not. All of this correspondence was attached to Mr. Howard's deposition when it was taken. Whether we had the originals at that time, or not, I do not know.

Mr. BROBECK.—Well, I think you must know, Mr. Olney, in that respect, because you will recall I think with distinctness, that the correspondence which was then presented by Mr. Howard was the correspondence which he had received from Mr. Evans, and that bundle of correspondence or letters consisted of the original letters written by Mr. Howard to Mr. Evans, and of carbon copies of letters written by Mr. Evans to Mr. Howard. You recall that, do you not? [468—153]

Mr. OLNEY.—In general, that statement is true. Whether there was at that time present the original of the letter of February 10th, I do not know. My recollection is that the letter of February 10th was called to the attention of the witness out of its chronological order. It may have been turned over to the Reporter at that time for all I know.

Mr. DUNNE.—It was a letter of March 4, which was read out of its order. We have never seen the originals of those letters.

Mr. BROBECK.—The letter of March 4, as it appears in the transcript of the testimony as made by the Reporter, has not the signature of Mr. Evans to it, it being simply a carbon copy of that letter.

Mr. OLNEY.—Well, he signed it.

Mr. BROBECK.—Oh, of course, there is no question but that the original was signed by him, but in

view of the fact that the stenographer was then using the carbon copy it was not possible as I remember that he could have attached Mr. Evans's signature. I offer that suggestion merely for the purpose of showing that the original letter was not handed over to the stenographer at that time. That appears on pages 50 and 51 of Mr. Howard's deposition.

Mr. OLNEY.—I call your attention, Mr. Brobeck, to the fact that that letter is addressed to Mr. Howard in New York.

Mr. BROBECK.—That is the letter of March 4th?

Mr. OLNEY.—Yes, sir.

Mr. BROBECK.—We can account for the custody of the letter up to a certain point, but there we lose it. That is the reason why we have been a little bit anxious to relocate it. However, it will develop in the course of the trial or hearing.

Mr. DUNNE.—I offer in evidence this correspondence which as soon as we can have it sorted will be submitted to our friends on the other side, as follows—I will state our offer and in the meantime counsel can examine the correspondence.

A letter dated February 25, 1906, from John L. Howard, at Bellingham, Washington, to Dr. I. A. Bachman.

A letter dated June 26, 1906, from John L. Howard, to W. J. Dingee.

A letter dated July 2, 1906, from John L. Howard to Dr. I. A. Bachman.

A letter dated July 3, 1906, from John L. Howard to Dr. I. A. Bachman.

A letter dated July 4, 1906, from John L. Howard

to Dr. I. A. Bachman.

A letter dated July 5, 1906, from John I. Howard to Dr. I. A. Bachman.

A letter dated July 8, 1906, from John I. Howard to Dr. I. A. Bachman. [469—153a]

A letter dated July 9, 1906, from John L. Howard to Dr. I. A. Bachman.

Letters dated July 16th and 18th, 1906, from the Union Oil Company of California, Kilborn & Clark Company and the Western Mining Supply Company, to Evans, Coleman & Evans, Kendall, Washington, these letters being all pinned together, and pinned to them a slip of white paper signed "E. E. E." and also pinned thereto a yellow slip signed "J. L. H." And in regard to that, gentlemen, I would like to know if that white slip signed "E. E. E." is not in the handwriting of Mr. Ernest E. Evans?

Mr. OLNEY.—We will dispose of these one at a time.

Mr. DUNNE.—A letter dated July 20, 1906, from Ernest E. Evans to John L. Howard.

A letter dated August 4, 1906, from Bruce Cornwall to G. W. McEnerney.

A letter dated August 7, 1906, from John L. Howard to Dr. I. A. Bachman.

A letter dated August 10, 1906, from Ernest E. Evans to J. L. Howard.

A letter dated August 12, 1906, from G. W. McEnerney to Bruce Cornwall.

A letter dated August 13, 1906, from Bruce Cornwall to G. W. McEnerney.

A letter dated August 18, 1906, from John L. Howard to W. J. Dingee.

A letter dated August 23, 1906, from John L. Howard to W. J. Dingee, containing copy of letter of Ernest E. Evans.

A letter dated August 23, 1906, from John L. Howard to Dr. I. A. Bachman.

A letter dated August 27, 1906, from John L. Howard to Dr. I. A. Bachman.

A letter dated August 27, 1906, from D. N. Reidley to John L. Howard.

A letter dated August 30, 1906, from John L. Howard to A. B. Williamson.

A letter dated August 31st, 1906, from W. J. Dingee to Dr. I. A. Bachman.

A letter dated September 12, 1906, from John A. Howard to W. J. Dingee.

A letter dated September 24, 1906, from J. L. Howard to W. J. Dingee.

A letter dated October 3, 1906, from Henry Blakely to John L. Howard. [470—153b]

A letter dated October 4, 1906, from E. C. Lyle to John L. Howard.

A letter dated October 9, 1906, from John L. Howard to Dr. I. A. Bachman.

A letter dated October 9, 1906, from John L. Howard to W. J. Dingee.

A letter dated 17, 1906, from John L. Howard to W. J. Dingee.

A letter dated November 17, 1906, from John L. Howard at Seattle, to W. J. Dingee at New York.

A letter dated November 17, 1906, from John L.

Howard to W. J. Dingee.

A letter dated November 21, 1906, from John L. Howard at San Francisco, to W. J. Dingee, at New York.

A letter dated January 9, 1907, from John L. Howard to W. J. Dingee.

A letter dated January 21, 1907, from John L. Howard to W. J. Dingee.

A letter dated February 19, 1907, from John L. Howard to W. J. Dingee.

A letter dated March 4, 1907, from John L. Howard, at San Francisco to W. J. Dingee, at New York.

A letter dated March 18, 1907, from John L. Howard to Dr. I. A. Bachman.

A letter dated March 18, 1907, from John L. Howard to Dr. I. A. Bachman.

A letter dated March 21, 1907, from John L. Howard to Dr. I. A. Bachman.

A letter dated March 27, 1907, from John L. Howard of San Francisco to W. J. Dingee at New York.

An undated telegram to John L. Howard, Butler Hotel, Seattle.

A letter dated April 26, 1909, from John L. Howard to W. J. Dingee.

If it is agreeable to your Honor, and to counsel on the other side, we will do the work of sorting out this correspondence during the noon hour and hand it over to counsel, and we will now proceed with some testimony.

The MASTER.—With reference to this letter of March 4th, that you have been talking about, you will remember that you only read parts of Mr. Howard's

deposition. Was that in a part that you read?

Mr. DUNNE.—The letter of March 4th, along with all the other correspondence in Mr. Howard's deposition, has been admitted. [471—153c]

Mr. BROBECK.—And special reference was made to that letter as having appeared in the body of the deposition.

The MASTER.—My suggestion was simply for the purpose of having the record clear on that point.

Mr. DUNNE.—Yes, your Honor.

[Testimony of A. B. Davis, for Complainant.]

A. B. DAVIS was then called as a witness on behalf of the complainant, and after having been first duly sworn, testified as follows:

My occupation is that of secretary of corporations. I am Secretary of the Bellingham Bay and British Columbia Ry. and have been such secretary since the 24th of March, 1911. I have with me the stock books of that company and the certificate book. William J. Dingee appears as a stockholder on stock journal of the Bellingham Bay and British Columbia Ry. Co., the page of the journal in which he appears as a stockholder is page 11, and on that page 11 of the stock journal of the Bellingham Bay and British Columbia Rr. there appears first the name of William J. Dingee; second ledger folio No. 26; third certificate No. 64.—fourth No. of shares 5, fifth total number of shares 5; and sixth the signature, subject to the by-laws of the company, William J. Dingee. There also appears upon the same page the following: First, the name John L. Howard; second, the

(Testimony of A. B. Davis.)

ledger folio 32; third, certificate No. 61; fourth, number of shares 5; fifth, total number of shares 5; sixth, signature, subject to the by-laws of the company, John L. Howard. And there also appears on the same page of this journal the words "Garret W. McEnerney," appearing in the first column, 27 appearing as the ledger folio; 62 as the number of certificate; 5 as the number of shares; and the total number of shares 5; and the signature Garret W. McEnerney under the word "signature subject to the by-laws of the Company." And there also appears upon the same page of said journal in the first column of that page the words "William J. Dingee, trustee"; in the second column ledger folio 32; and the third column number of certificate 63; in the fourth column number of shares 2881, in the next column total number of shares 2881, and the signature William J. Dingee. I can [472—154] ascertain from that page of the journal the names upon which the stock stood upon the surrender of which these certificates were made; those certificates stood in the names of Bruce Cornwall, trustee; Bruce Cornwall, trustee; Florence C. Moore, Florence C. Moore, Florence C. Moore, Florence C. Moore; Bertha J. C. Fischer, the date according to the journal of the transfer so made is January 22, 1907. I can tell whether there appears upon the books any subsequent transfer of certificates numbered 61, 62, 63 and 64. Certificate 61, standing in the name of John L. Howard, for 5 shares, was cancelled January 20, 1909; that was transferred at that time to William J. Dingee, trustee. Certificate No.

(Testimony of A. B. Davis.)

62, for 5 shares, standing in the journal in the name of Garrett W. McEnerney, was never transferred to anybody, and is still in the name of Mr. McEnerney. Certificate 63, standing in the journal in the name of William J. Dingee, trustee, was transferred on January 11, 1908, to William J. Dingee, trustee, in two certificates; the amount of the first certificate was 2,800 shares, and that was certificate No. 67; and the amount of the second certificate was 81 shares, and that was certificate No. 68. Certificate No. 64 has not been transferred, and it still stands in the name of William J. Dingee individually. Certificate No. 67 for 2,800 shares, dated Feb. (Jan.?) 11, 1908, has not been transferred on the books to anyone. No transfer has been made of certificate 68; also dated (Jan.?) 11, 1908, for 81 shares.

I can state from my records when Mr. John L. Howard was elected vice-president and director of the Bellingham Bay and British Columbia Ry. Company. I have now before me the minute book containing the minutes of the Board of Directors and Stockholders of the Bellingham Bay and British Columbia Ry. Company; and I read that portion of the minutes of the annual meeting of the stockholders of the Bellingham Bay and British [473—155] Columbia Ry. Company pursuant to adjournment on the 26th day of January, 1907, which relates to the election of directors as follows:

“RESOLVED, that the stockholders proceed to the election of a Board of Directors to act for the ensuing year and until their successors are elected

and qualified. The following stockholders were thereupon duly nominated as Directors; William J. Dingee, Garrett, W. McEnerney, S. P. Smith, Frank G. Drum, D. O. Mills, John L. Howard and H. H. Taylor. On motion duly made and seconded, the nominations were declared closed. The ballots were thereupon cast for Directors and it was found and determined that each of the nominees had the votes, as follows: William J. Dingee, 8,956 shares; Garrett W. McEnerney, 8,956 shares; S. P. Smith, 8,956 shares; Frank G. Drum, 8,956 shares; John L. Howard, 8,956 shares; D. O. Mills, 8,956 shares; H. H. Taylor, 8,956 shares. The president thereupon declared that William J. Dingee, Garrett W. McEnerney, S. P. Smith, Frank G. Drum, John L. Howard, D. O. Mills and H. H. Taylor, had been duly elected directors of the corporation to act for the ensuing year and until their successors were elected and qualified."

I have before me the minutes of the meeting of the Board of Directors of the company which immediately followed and resulted in the election of the officers of the company. That meeting was held upon the same day and immediately following the adjournment of the stockholders' meeting, and I read a portion of the minutes which relates to the election of the officers of the company. (Reading:)

"Said meeting was held immediately after adjournment of the meeting of the stockholders of said corporation, held at its office at the hour of 11 o'clock A. M. on said day. H. H. Taylor, President, called the meeting to order. John S. Drum, Secretary, kept a record of the proceedings. There were present the

following directors: William J. Dingee, G. W. McEnerney, John L. Howard and H. H. Taylor. There were absent, Directors F. G. Drum, S. P. Smith, D. O. Mills. On motion, duly made and seconded, the following resolution was unanimously adopted:

RESOLVED: That Director G. W. McEnerney be and he is hereby elected Temporary Chairman.

Director G. W. McEnerney took the chair and announced that the election of officers was in order. On motion, duly made and seconded, the following resolution was unanimously adopted:

RESOLVED: That H. H. Taylor be and he is hereby elected President of this corporation to serve for the ensuing year and until his successor is elected and qualified. H. H. Taylor thereupon accepted the office. Director G. W. McEnerney thereupon vacated the chair and H. H. Taylor as President thereafter presided at the meeting. On motion, duly made and seconded, the following resolution was unanimously adopted:

RESOLVED: That John L. Howard be and he is hereby elected Vice-President [474—156] of this corporation to serve for the ensuing year and until his successor is elected and qualified."

That portion of the minutes which fixes the salary of the vice-president reads as follows: "On motion duly made and seconded, the following resolution was unanimously adopted: resolved, that the following salaries attach to the officers of this Corporation: Vice-President, \$125.00 per month." There was no more than one vice-president. I have here the minutes of the directors' meeting of February 8, 1909,

and that portion of those minutes which relates to the continuance of Mr. Howard as vice-president shows that another man was elected vice-president. That portion of the minutes reads thus: "On motion duly made and seconded, the following resolution was unanimously adopted: Resolved, that Frank G. Drum is hereby elected vice-president of this corporation, to serve for the ensuing year and until his successor is elected and qualified." That meeting did not immediately follow the stockholders' meeting of that year; that date of the stockholders' meeting of that year was the 19th of January, 1909. As appears from the minutes before me, Mr. Howard was not elected a director at the stockholders' meeting on the 19th of January, 1909. I have before me the minutes of a special meeting of the directors of the Bellingham [475—156a] Bay and British Columbia Railroad held on the 26th of March, 1908, and those who appeared at that meeting as directors were William J. Dingee, Garrett W. McEnerney, Frank J. Drum, John L. Howard, and H. H. Taylor; absent, D. O. Mills; those gentlemen were present according to these minutes and acting as directors.

[Testimony of E. H. Hammon, for Complainant.]

Thereupon E. H. HAMMON was called as a witness on behalf of the complainant, and, after having been first duly sworn, testified as follows, to wit:

Direct Examination.

I am the general auditor of the Bellingham Bay and British Columbia Ry. Company and as such my

(Testimony of E. H. Hammon.)

duties are to keep the records of the accounts. I cannot say exactly how long I have been such general auditor. I have been connected with the Company virtually in that capacity for twenty years. In the course of my duties as auditor of that company I am required to make up its financial statements. The company has adopted as its fiscal year the fiscal year ending June 30th; our fiscal year ends June 30th and begins July 1st; for the fiscal year ending June 30th, 1908, I prepared a financial statement of the condition of the company, and I have a draft of it with me. I hand you the annual report of the Bellingham Bay and British Columbia Railway Company made to the Interstate Commerce Commission of the United States for the year ending June 30th, 1908. The capitalization of the company is \$1,000,000; and the capital stock of the company is divided into 10,000 shares of \$100 each. On June 30th, 1908, and during the fiscal year ending June 30th, 1908, the bond indebtedness of that railroad was \$659,000; and the total amount of the floating indebtedness of June 30th, 1908, was \$262,843.42. The gross earnings of all kinds of the company for the fiscal year ending June 30th, 1908, was \$225,630.83, and the operating expenses, including depreciation of equipment charged as required by the Interstate Commerce Commission, amounted to \$169,650.99, which did not include taxes; the taxes amounted to \$11,285.01; the fixed charges for interest on bonds [476—157] and on the floating indebtedness amounted to \$43,272.00; and there were some miscellaneous deductions

(Testimony of E. H. Hammon.)

amounting to \$338.65. Taking into consideration all of the charges, the net earnings of the road for that year were \$28.98.

Of the amount included in operating expenses for depreciation a considerable proportion was not actually expended and the actual cash result of the operation of the road is a little better than is shown by the figures I have just given you. Prior to that time we have never defaulted in our interest on our bonds, and have always been able to meet our fixed charges. On June 30, 1908, the length of the main line of the road was 49.47 miles and the sidings and spurs together were 18.06 miles. The equipment of the service of the road included 7 locomotives, 7 passenger cars, 188 freight-cars and 5 work-cars in the company's service, such as caboose cars and others; total number of cars, 200. The gasoline motor car was not bought at that time. It was subsequently acquired, I think, in 1909. We had none in 1906 or 1907. When you spoke of a motor car I supposed you meant a motor car for carrying of passengers such as we have now, with a capacity of some 80 passengers. Any motor car that was traveled on to Kendall previous to June 30, 1908, was a little work-car that carried perhaps 2 persons. I have never ridden on it myself. That is the kind of car you are speaking of. It is sometimes known as a railroad automobile, but is included in the work equipment. The earnings of the various divisions of the road were not kept separate. The road runs from Bellingham to Sumas, in a northerly direction from Sumas, which

(Testimony of E. H. Hammon.)

runs in a southeasterly direction. It takes a sharp turn at Sumas, which makes practically a "V" of it. The first is known as the eastern extension. I do not know whether the other is known as the Western division. I cannot segregate the earnings of these two portions of the line. They [477—158] have not been separated. The total receipts from the passenger train service, which includes passengers' excess baggage, mail, express and milk carried on passenger trains during the fiscal year ending June 30, 1908, was \$70,600.71, and the gross freight earnings for that year amounted to \$135,622.46. On the books of the railroad there does appear an obligation to the Northwestern Portland Cement Company, but it is not \$10,000. I cannot tell you how much it is. I have not the books here. My memory, which is subject to correction—I don't swear to it—is that the gross amount of the obligation is a little under \$9,000, but is subject to a deduction of about half that amount for the construction of a spur into the proposed cement plant at Kendall which was constructed for the Northwestern Portland Cement Company. That spur, so far as our road defrayed the expenses of its construction, has never been paid for. There is still an obligation on our books against the Northwestern Portland Cement Co.; and whatever expense that incurred on constructing that spur has not yet been met by the Northwestern Portland Cement Co. The remaining portion of this sum, a little less than \$9,000, was an obligation incurred by the Bellingham Bay and British Columbia Railroad Co. It is my

(Testimony of E. H. Hammon.)

belief that that obligation arose out of moneys advanced by the cement company to our company to purchase a locomotive, and the net balance of this account between the companies is a balance owing by the Bellingham Bay and British Columbia Railroad Company to the Northwestern Cement Co. That really grew out of the purchase of some rails by the cement company which were used in the replacement of the rails which were taken from the road of the railroad company, and which rails taken from the road of the railroad company were subsequently used on the spur, that is, the old rails taken out from the main line of the road, laid in the spur and the new rails purchased by the cement company [478—159] were laid in the main line, and the difference in value is the difference between the cost of constructing the spur and the amount of the bill which was paid by the cement company; it is my recollection that the bill paid by the cement company was for rails, and the rails, I believe, were new rails. It should not be understood that the cement company laid the rails on the main line. The cement company merely paid the bill for the rails, the work was done by the railroad company. The new rails which were purchased or which were paid for by the cement company went into the main line of the railroad, and the second-hand rails which were thus replaced were laid in the spur, and the cement company was charged with the value of the second-hand rails which were taken out in that way, with other costs of construction of the spur. So

(Testimony of E. H. Hammon.)

that it amounts to this, that the railroad owes the cement company something less than \$5,000, I should say, we have an offset against this \$9,000 claim consisting of the cost of constructing the spur. I think it is more correct to say that the money was advanced for the purchase of the rails than for the purchase of a locomotive, because it is my recollection that it was a bill for rails which the cement company paid. Still the transaction may have had some reference to the purchase of a locomotive, and entered into it in order to facilitate that purchase which was made about that time. I have no information of such points except such as can be substantiated by the records which I kept. My own knowledge on the subject is such knowledge as I have derived from conversation with other officers of the company. My official relations do not concern the general policy of the company in purchasing locomotives or putting in new rails or matters of that sort. As to whether the facts are these that it was not thought that the equipment of the Bellingham Bay and British Columbia Railway Co. was sufficiently heavy to sustain [479—160] the transportation of the machinery which was to be used in the construction of the cement plant and that the cement company therefore advanced to the railroad company sufficient money amounting to \$10,000 to purchase an engine of larger power than the Bellingham Bay and British Columbia Railway then had in service, I will say that this question does not lie within my province as general auditor of the company. I can only say what my understanding of the

(Testimony of E. H. Hammon.)

matter was, covered, as I say, in conversation with other officials. My understanding is that a heavier locomotive was expected to be needed, not to haul machinery to the plant, but to handle the product of the plant, when it would be established—the cement company—and it was out of that condition that the purchase of this locomotive came about by the railroad company. It is a fact, as I have testified, that the cement company paid a bill for the rails; the necessity for them arose from the need or expected need of a heavier locomotive. The cement company did not buy the locomotive; it did not advance any other money than what I have spoken of—the amount of the bill for rails. It is not the fact that the Bellingham Bay and British Columbia Railway bought the locomotive and charged it to the account of the cement company. The cement company paid for new rails for the railroad company and these new rails were put in the main line of the railroad, and the second-hand rails were put in the spur track leading to the cement company's proposed works. The cement company charged the railroad company with the amount of money which it advanced for the purchase of new rails, and, on the other hand, the railroad company charged the cement company with the value of the second-hand rails that had been placed and were used in the spur. I cannot say whether or not that was the consummation of that transaction and all there was in that transaction involving these accounts between the two companies. The locomotive does not enter into the account at [480—161] all.

(Testimony of E. H. Hammon.)

The railroad company went and bought that on its own account in anticipation possibly of the needs of the cement company; the money which the cement company paid the railroad company being the amount of the bills for rails was understood to be used in part for the purchase of the locomotive. That was the only connection I know of with the locomotive and these accounts.

Cross-examination.

The accounts receivable of the railroad including cash on hand as of June 30, 1908, amounted to \$10,-599.57. The cost of the road June 30, 1908, was \$1,481,590.56. The business depression began in November, 1907. I do not remember that on our road there had been a laying off of business beginning with the spring of 1907. After Nov. 1st, 1907, the business of the road dropped off. Figures that I have given here are offered with the idea of affording some idea as to the value of the stock; there is nothing else that I can offer in that regard in explanation of the figures. As cost of equipment, I have charged \$282,055.82. That is the original cost. Depreciation is not deduced from that account; it is simply carried to operating expenses and carried as a reserve—that is, as a liability. In the liability items there appears this item: Equipment and replacement, \$19,227.49; that was the unexpended amount of depreciation charged to operating expenses during that year.

[Testimony of Edward McGary, for Complainant.]

Thereupon EDWARD McGARY was called as a witness on behalf of the complainant, and after having been first duly sworn, testified as follows, to wit:

Direct Examination.

I reside in the city of Oakland, County of Alameda, State of California. I am acquainted with William J. Dingee. I think I first met him in 1894. Since 1894 I have been associated with Mr. Dingee in various corporate enterprises up to some time [481—162] in June, 1908. I have been associated with him in the Oakland Water Co. and the Contra Costa Water Co., the Standard Portland Cement Co. and corporation, the Santa Cruz Portland Cement Co. I think I was in the Northwestern Portland Cement Company, the North Hampton Portland Cement Co. and the Atlantic. I rather think I was associated with Mr. Dingee in all his cement enterprises. He may have owned some other companies, though. But so far as my knowledge goes I was associated with him in these various cement enterprises. While I was with the Contra Costa Water Co. I was secretary and later vice-president; it was through the influence of Mr. Dingee that I became such officer in that company. I was a director and also vice-president, I think, of the Northwestern Portland Cement Company; and in the Standard Company and in the Santa Cruz Company I occupied a similar position in each of those companies through the influence of Mr. Dingee. In the transacting of corporate business in these various corpo-

(Testimony of Edward McGary.)

rations which I have mentioned I carried out the views or policies of Mr. Dingee. I acted at Mr. Dingee's dictation in my corporate conduct as director in these various corporations; and we called all of the meetings of these various companies; in particular, the meeting of the Standard Portland Cement Corporation held on May 5th, 1908.

Cross-examination.

I acted under the dictation of Mr. Dingee in my capacity as director of these companies of Mr. Dingee's, regardless or without considering the propriety of the action which I was called on to take, but I would presume that the acts were all appropriate. I was there as a director, and occupied a fiduciary capacity toward the stockholders of the company.

Q. Did you consider that fact at that time?

A. Well, I did as Mr. Dingee said, regardless as to whether I was carrying out the duties that were imposed upon [482—163] me as a director, yet, presuming always that Mr. Dingee told me to do what was right. I would not have done anything that would be criminal in any matter. I would have done what anybody else would who was placed in there by a person who owned or controlled the corporation that I was interested in. I would not want to go so far as to do a criminal act. The fact of the matter is that I did not refuse to do anything he asked me to do. I presumed that Mr. Dingee would not ask me to do anything that would be wrong or criminal. I considered, in a measure, the propriety

(Testimony of Edward McGary.)

of the acts that I was called upon to do as a director, but I was impressed with the fact that I was to do what Mr. Dingee told me to do, and that was the sum and substance of the matter with me. I owned some shares of the Northwestern Portland Cement Co. in my own right—not shares that I held for someone else, but held on my own account, and likewise in the Santa Cruz and the Standard. There were two North Hamptons, a North Hampton of California and a North Hampton, I think, of Pennsylvania—or may be it was New Jersey. I guess it was New Jersey. I have some in the Delaware concern. It is an eastern concern. I own stock in the Atlantic.

[Testimony of L. F. Young, for Complainant.]

Thereupon L. F. YOUNG was called as a witness on behalf of said complainant, and after having been first duly sworn testified as follows, to wit:

Direct Examination.

I am the secretary of the Santa Cruz Portland Cement Co., the Standard Portland Cement Co., the Standard Portland Cement Corporation and the Santa Cruz Lime Company. My office is in the Crocker Building, in this city. I am secretary of each of these companies individually. I am not the secretary for them as a mass of corporations, but for each company or corporation separately, each of these companies keeps its accounts and assets separate from those of the others. I became secretary

(Testimony of L. F. Young.)

of these [483—164] various cement companies about the middle of May, 1907, at the instance of William J. Dingee. William J. Dingee controlled these companies at that time. As such secretary I was familiar with the affairs in 1908 of the Standard Portland Cement Corporation and the Santa Cruz Portland Cement Company. The two documents which you exhibit to me and ask me to state whether they were correct and accurate representation of the condition of affairs of each of these corporations on April 30, 1908, one of which is the trial balance of the Santa Cruz Portland Cement Co., dated April 30, 1908, and the other of which is a trial balance of the Standard Portland Cement Corporation, dated April 30, 1908, I will say, from my knowledge of the affairs of the companies at that time, are correct.

Mr. DUNNE.—I offer these in evidence.

The MASTER.—The trial balance of the Santa Cruz Portland Cement Co. will be “Complainant’s Exhibit 11” and the trial balance of the Standard Portland Cement Corporation will be marked “Complainant’s Exhibit 12.”

Thereupon each of said trial balances was received and read in evidence in said cause, and was and is in the words and figures following, to wit:

[Complainant's Exhibit No. 11.]

"SANTA CRUZ PORTLAND CEMENT COMPANY, TRIAL BALANCE, APRIL 30th, 1908.			
William J. Dingee.....	\$ 117,488.13	Irving A. Bachman.....	\$ 22,865.02
Sand Standardizing Plant.....	494.64	Edward McGary	4,000.
W. J. Moylan	150.00	Cash	516.13
Dingee & Bachman.....	62,925.93	Merchandise	45,689.08
F. H. Davis.....	900.00	Injury	1,002.12
Profit and Loss.....	161.59	Refund	6.72
Furniture and Fixtures.....	1,270.50	Pay-roll—Special	1,249.95
Merchandise—Over and Under		Claims	43,210.38
Charges	1,863.77	Coupons #4.....	1,170.
Sacks (returning).....	10,628.49	" #5.....	1,350.
Construction Building.....	12,267.95	Surplus	179,356.
Machinery	50,873.50	Bonds	1,107,000.
Claims and Allowances.....	7,492.83	Bills Payable	1,125,444.84
Machinery and Plant.....	6,995,182.12	Capital Stock	5,000,000.
Construction	8,328.82	Northwestern P. Ce. Co.....	103,233.33
Manufacturing Expense	58,241.01	Northampton P. Ce. Co.....	1,000.
Repairs	19,393.59	Santa Cruz Lime Co.	40,730.
Supplies	81,732.71	Lime Rock	3,519.63
Advertising	112.50	Pay-roll	46,448.21
[484—165]			
Expense	9,890.56	Sundry Earnings	1,294.37
Traveling Expense	561.57	Western Bldg. Mat. Co. <i>Gen.l.</i> ...	3,462.54
Freight	266.14	D. L. Hass Co.....	66.80
Mill Expense	2,928.86	Pac. Hdwe & Steel.....	490.21
Interest	56,922.87	Bemis Bros. Bag Co.....	112.22
Taxes and Insurance.....	956.40	E. L. DuPont deNemours Powder	
Salaries and Expense Salesmen..	678.70	Co.	4,961.30
Standard P. Cement Corp.....	73,440.89	Benicia Iron Wks.....	323.67
Atlantic P. Cement Co.....	210,814.78	General Electric	274.13
Western Bldg. Material Co.....	10,528.65	Standard Oil Co.....	194.90
" Bldg. Material Co. <i>Sepcial.</i>	31,508.84	F. W. Braun.....	33.18
Associated Oil Co.....	2,145.42	Allis Chalmers.....	3,026.80
Freight <i>Speical.</i>	3.45	Standard Elec. Co.....	13,121.30
American Bridge Co.....	135,124.12	Westinghouse Lamp Co.....	386.44
W. F. Mosser & Son.....	2,544.09	Westinghouse Elec. & Mfg. Co...	136.07
Southern Pacific Co. claims.....	43,094.78	Webster Mfg. Co.....	148.95
Ocean Shore Ry. Co.....	402.50	H. N. Cook Belting Co.....	23.67
L. Moretti	250.48	Stockton Iron Works.....	58.32
Humboldt Contracting Co.....	75.	F. G. Noyes.....	95.99
Jno. A. Roeblings Sons Co.....	66.89	Lyons Gypsum Co.....	953.53
Byrne Bros.	3,284.87	Pelton Water Wheel Co.....	29.95
Fred R. Muhs.....	50.	F. A. Hihn Co.....	1,110.99
Healy Tibbets Const. Co.....	494.90	Seidlinger Transfer Co.....	16.80
Ocean Shore Ry. Co. <i>Spl.</i>	8,545.75	S. T. S. Oil Co.....	1,222.09
Western Calcium Co.....	2,989.56	Giant Powder Co.....	350.00
C. H. Weed Eng. & Mch. Co.....	3.30	Southern Pacific Co. <i>Frt.</i>	43,097.35
M. C. Seagrave.....	168.65	Dunham, Carrigan & Hyden....	3,911.18

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Waterhouse & Price.....	2,038.75	Roberts & Chittenden.....	488.95
Coast Counties Elec. Lt. Co.....	6.60	Henry Willey Co.....	167.29
Davenport Lt. & Power Co.....	1.00	Cumberland Coal Co.....	225.53
Standard Elec. Company.....	2.09	Big Creek Power.....	72.00
Bank of Santa Cruz Co.....	53.20	Union Lithograph	16.
American Sh. & Tin Plate Co....	52.06	Pac. Rolling Mills Co.....	2,987.01
R. F. Sturtevant.....	1,462.50	W. P. Fuller Co.....	578.01
Calif. Gas & Elec. Corp.....	288.06	Crane Co.....	1,490.49
Olson-Mahony Lumber Co.....	166.29	Craton & Knight Mfg. Co.....	963.16
G. C. Prahtner.....	79.30	Ocean Shore Ry.....	490.75
Rucker Desk Co.....	200.	Davenport Cash Store.....	30.20
Southern Pacific Co.....	143.00	Loma Prieta Lumber Company..	2,554.32
Coast Dairies Option.....	100.	Harron, Rickards and McCone...	90.49
J. W. Galvin.....	800.	Paynes Bolt Works.....	71.25
[485—165a]		Mrs. Emma Rose.....	200,000.
		Western Builders Supply Co....	141.50
		Rovt. W. Hunt & Co.....	154.50
		Brooks-Fallis Elec. Corp.....	31.69
		Cox & Moretti.....	830.96
		Johnson Bros.	53.50
		Shattuck & Desmond Const. Co..	477.35
		Tubbs Cordage Co.....	736.27
		The Napa Journal.....	120.
		Rose Fire Brick Co.....	121.85
		G. M. Josselyn & Co.....	228.27
		Santa Cruz Elec. Lt. and Power	
		Co.	92.25
		Drs. Phillips & Phillips.....	303.50
		Baker-Vawter Co.....	70.88
		Frank A. Losh.....	325.
		Althof & Bahls.....	9.
		H. E. Irish.....	14.20
		Henry R. Worthington.....	641.54
		H. S. Crocker Co.....	21.62
		Westinghouse Air Brake Co.....	14.28
		Coast Dairies & Land Co.....	1,703.37
		Pacific Fence Const. Co.....	3.
		Britton & Rey Co.....	160.—
		Pacific Coast Undertaking Co...	9.50
		Cutter & Co.....	172.75
		J. G. Tanner.....	25.03
		The Holmes Lime Co.....	14.
		J. M. Ferguson.....	13.50
		Calif. Wire Cloth Co.....	53.56
		Harbison Walker Ref. Co.....	1,138.39
		Smith Emery Co.....	456.70

\$8,032,643.95

\$8,032,643.95

[486—165b]

[Complainant's Exhibit No. 12.]

STANDARD PORTLAND CEMENT CORPORATION.

TRIAL BALANCE, APRIL 30, 1908.

F. W. Henshaw.....	1,750.00	William J. Dingee.....	19,571.96
Furniture and Fixtures.....	500.00	Irving A. Bachman.....	24,423.13
Merchandise—Over and Under-		Edward McGary.....	8,580.85
charges	7,844.82	L. H. Roseberry.....	9,000.
Sacks (returning).....	18,886.31	A. F. Morrison.....	1,000.
Commission	62.43	Profit and Loss.....	201.51
Claims and Allowances.....	7,275.54	Merchandise	66,476.49
Machinery and Plant.....	5,014,948.04	Pay-roll	18,106.18
Construction	5,842.09	Refund	60.16
Manufacturing Expense	33,038.20	Interest Receivable	6,330.
Repairs	39,588.64	Coupons #10.....	120.00
Supplies	58,622.28	“ #11	720.
Expense	7,670.61	Santa Cruz Lime Co.....	14,980.
Freight	755.04	“ “ P. Cement Co.....	73,440.89
Advertising	110.60	N. W. P. Cement Co.....	6,950.
Mill Salary	5,350.	Northampton P. Cement Co.....	4,150.
Mill Expense.....	551.05	Cash	515.44
Interest	9,802.79	Bills Payable	315,230.35
Taxes and Insurance.....	2,952.85	Bonds	272,000.
Atlantic P. Cement Co.....	8,790.26	Capital Stock	4,000.
Santa Cruz Portland Cement Co.		Western Bldg. Matl. Co. General.	696.8
Bonds	211,000.	Surplus	670,426.
Western Bldg. Material Co.....	78,549.78	H. Schwarz Co.....	360.61
Western Bldg. Material Co. Spe-		A. Hatt Warehouse & L. Co.....	86.84
cial	17,737.61	The D. L. Hass Co.....	155.05
Associated Oil Co.....	12,000.00	Bemis Bros. Bag Co.....	11,316.25
Napa Lumber Co.	317.38	E. I. DuPont de Nemours Powder	
Standard Oil Co.....	120.63	Co.	75.56
Bay Counties Power Co.....	15,352.35	Benicia Iron Wks.....	1,858.85
F. W. Henshaw.....	326.44	Meese & Gottfried Co.....	.05
Bowers Rubber Works.....	121.51	General Elec. Co.....	212.50
Cal. Paper & Board Co.....	95.95	F. W. Braun.....	30.20
Ideal Portland Cement Co.....	43.90	American Bridge Co.....	5,024.53
		Allis-Chalmers Co.....	3,037.53
		Westinghouse Lamp Co.....	220.75
		W. F. Mooser & Son.....	3,146.30
		Fairbanks Morse & Co.....	195.15
		Westinghouse Elec. & Mfg. Co...	705.58
		Diamond Rubber Co.....	4,149.02
		Modern Mfg. Co.....	998.94
		N. N. Cook Belting Co.....	179.67
		F. G. Noeys.....	325.55
		Stockton Iron Wks.....	1,057.61
		Jno. A. Roeblings Sons Co.....	13.66
		E. R. Gifford Co.....	18.50

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(Testimony of L. F. Young.)

[487—165c]

S. T. S. Oil Co.....	1,259.85
Vallejo City Water Works.....	234.00
Southern Pacific Co. Frt.....	10,522.17
Dunham, Carrigan & Hayden....	2,295.80
W. P. Fuller & Co.....	571.86
Port Costa Lumber Co.....	3.00
Graton & Knight M. Co.....	3,559.83
P. W. Murphy.....	10.25
H. S. Crocker Co.....	5.35
Waterhouse & Price Co.....	249.25
Joseph Levinson.....	51.75
Pacific Seale Co.....	9.90
R. M. Kyser.....	.35
Tubbs Cordage Co.....	288.78
United Sheet Metal Works.....	23.55
Corlett Bros.	1.25
Schwabacher-Frey Stationery...	6.30
Baker-Vawter Co.....	63.74
Selby Smelt. & Lead Co.....	75.98
F. A. Stewart.....	7.50
Monitor Publishing Co.....	25.00
Geo. S. Emerick.....	2,500.00
F. G. Easterby (Tax Coll.).....	2,094.25

\$5,560,008.22

\$5,560,008.22

Q. I will ask you to look at this memorandum of stock transfer, this memorandum having been checked up by yourself and Mr. Pringle, and tell me if that correctly represents the facts therein recited (handing). A. It does.

Mr. DUNNE.—I offer this memorandum, gentlemen. You are familiar with it. I will ask his Honor to mark it as an exhibit on behalf of the complainant.

Said document was thereupon received and read in [488—165d] the above-entitled cause, and is in words and figures, as follows, to wit:

[Complainant's Exhibit No. 13.]

MEMORANDUM RE STOCK TRANSFERS.

NORTHWESTERN PORTLAND CEMENT COMPANY.

1906.

Aug. 30 Shares issued Directors as

Total number of	qualifying shares	5
shares	50,000 I. A. Bachman.....	49995*
Sept. 28		<hr/> 50000

Cancelled Shares.	Name.	To Whom Issued.	New Certf.	Shares.
1906.				
Oct. 30. *49995 #6	I. A. Bachman	F. A. Losh, Tr.	10	9000*
		"	11	9000
		"	12	750
		"	13	750
		Wm. J. Dingee	14	15245
		I. A. Bachman	15	15250
			<hr/>	49995

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Cancelled Shares.	Name.	Cancelled Certificate.	To Whom Issued.	New Certificate.	Shares.
1906.			I. A. Bachman	#17	3
Dec. 12. *9000		#10	"	18	3
			"	19	5
			"	20	5
			"	21	8
			"	22 out	10
			"	23 out	10
			"	24	14
			"	25 out	25
			"	26 out	25
			"	27	42
			"	28 out	50
			"	29 out	50
			F. A. Losh, Trustee	30	8750*
				<hr/>	9000

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Cancelled Shares.	Cancelled Name.	To Whom Certificate. Issued.	New Certificate.	Shares.
*8750	F. A. Losh, Tr.	#30	L. Migliavacca	#31 out 10
			A. Migliavacca	32 out 5
			C. Migliavacca	33 out 5
			I. A. Bachman	34 10
			"	35 5
			"	36 5
			E. Q. Churchill	37 out 7
			"	38 7
			"	39 7
			"	40 7
			"	41 7
			Benj. Bradshaw	42 3
			"	43 3
			"	44 3
			"	45 3
			"	46 out 3
			F. A. Losh, Trustee	47 8660*
				<hr/> 8750
1907.				
Jan. 5.	*8660	F. A. Losh, Tr. #47	John L. Howard, Tr	51 250
			"	52 30
			"	53 30
			"	54 190
			F. A. Losh, Trustee	55 8160*
				<hr/> 8660
Jan. 7.	*8160	F. A. Losh, Tr. #55	Clarissa F. Hamilton	#56 out 220
			F. A. Losh, Trustee	57 7940*
				<hr/> 8160

Cancelled Shares.	Cancelled Name.	Cancelled To Whom Certificate. Issued.	New Certificate.	Shares.
Jan. 15. *7940	F. A. Losh, Tr.	#57 John Moore	#62 out	10
		F. A. Losh, Trustee	63	7930*
				<hr/> 7940
Jan. 18. *7930	F. A. Losh, Tr.	#63 Ernest E. Evans	#64	150
		"	65	150
		"	66	150
		F. A. Losh, Trustee	67	7480*
				<hr/> 7930
Feb. 8. *7410	F. A. Losh, Tr.	#67 Solomon Gump	#86	50
		Alfred S. Gump	87 out	20
		F. A. Losh, Tr.	88	7410*
				<hr/> 7480
Feb. 13. *7410	F. A. Losh, Tr.	#88 Katherine E. Murden	#90 out	10
		F. A. Losh, Tr.	91	7400*
				<hr/> 7410
Feb. 15. *7400	F. A. Losh, Tr.	#91 Henrietta E. Clerk	#92 out	50
		F. A. Losh, Tr.	93	7350*
				<hr/> 7400
Feb. 16. *7350	F. A. Losh, Tr.	#93 Samuel Boyd, Secy.	#94	8350*
Feb. 16. *7350	S. A. Boyd,			
	Secy.	94 Ellis Lewis	95 out	25
		E. W. Doughty	96 out	20
		Huanna H. Noyes	97 "	20
		Julia R. Noyes	98 "	30
		Frank G. Noyes	99 "	25
		"	100 "	40
		"	101 "	5
		"	102 "	5
		"	103 "	5
		"	104 "	5
		"	105 "	5
		"	106 "	5
		"	107 "	5
		"	108 "	5
		L. F. Boyd, Secy.	109	7150*
				<hr/> 7350

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	Cancelled Shares.	Name.	Cancelled Certificate.	To Whom Issued.	New Certificate.	Shares.
Feb. 26.	*7150	S. A. Boyd, Secy.	#109	Nat. Raphael	#110 out	100
				S. A. Boyd, Secy.	111	7050*
						<hr/> 7150
Mch. 1.	*7050	S. A. Boyd, Secy.	#111	R. C. Baird	112 out	50
				S. A. Boyd, Secy.	113	7000*
						<hr/> 7050
Mch. 8.	*7000	S. A. Boyd, Secy.	#113	Victor M. Reiter	114 out	10
				S. A. Boyd, Secy.	115	6990*
						<hr/> 7000
Mch. 14th.	*6990	S. A. Boyd, Secy.	#115	S. A. Boyd, Secy.	#120	6890*
				G. Migliavacca		
				Inv. Co.	121 out	25
				"	122 "	25
				"	123 "	25
				"	124 "	25
						<hr/> 6990.
Mch. 14th.	*6890	S. A. Boyd, Secy.	#120	T. R. Stockett, Tr	125	30
				Thomas Graham	126	10
				Jennie Hamilton	127	10
				A. S. Boyd, Secy	128	6840*
						<hr/> 6890
Mch. 25.	*6840	S. A. Boyd, Secy.	#128	Joseph Marin	129 out	10
				S. A. Boyd, Secy.	130	6830*
						<hr/> 6840
Mch. 28.	*6830	S. A. Boyd, Secy.	#130	William J. Whitney	133 out	25
				May Anna Haley	134 "	25
				S. A. Boyd, Secy.	135	6780*
						<hr/> 6830
Apr. 1.	*6780	S. A. Boyd, Secy.	#135	J. A. Sidey	136 out	10
				S. A. Boyd, Secy.	137	6770*
						<hr/> 6830

Cancelled		Cancelled To Whom		New	
Shares.	Name.	Certificate.	Issued.	Certificate.	Shares.
Apr. 10.	*6770	S. A. Boyd, Secy.	#137	Mary A. Mathews	138 20
				J. B. McNally	139 out 20
				S. A. Boyd, Secy.	140 6730*
					<hr/> 6770
Apr. 13.	*6730	S. A. Boyd, Secy.	#140	Elise S. Davis	141 out 10
					142 " 10
					143 " 10
					144 " 10
					145 " 10
					146 6680*
					<hr/> 6730
Apr. 15.	*6680	S. A. Boyd, Secy.	#146	Samuel Martin	147 out 100
				C. W. Camm	148 " 100
				F. E. Booth	149 " 100
				Newman Bros.	150 " 50
				Edward McGary	151 " 175
				" "	152 " 175
				S. A. Boyd, Secy.	153 " 5980*
					<hr/> 6680
Apr. 25.	*5980	S. A. Boyd, Secy.	#153	George R. Gay	161 out 20
				Engelbos Weise	162 " 20
				Kristianna Wiese	163 " 10
				A. H. Hills	164 " 50
				E. H. Temple	166 " 10
				R. A. Hills	165 " 50
				S. A. Bpyd, Secy.	167 5820*
					<hr/> 5980
Apr. 25.	*5820	S. A. Boyd, Secy.	#167	Edw. McGary	168 out 80
				"	169 " 80
				S. A. Boyd, Secy.	170 5660*
					<hr/> 5820
Apr. 30.	*5660	S. A. Boyd, Secy.	#170	S. A. Boyd, Secy.	171 6170*
	750	F. A. Losh, Tr.	12	Wm. J. Dingee, Tr.	172 990
	750	"	13		<hr/>
				(J. L. H. Tr. #188-850)	7160
				(L. F. Y. " #189-740)	
				June 7, 1907.	
May 1.	*6170	S. A. Boyd, Secy.	171	Annabella Buckland	175 out 20
				S. A. Boyd, Secy.	174 6150*
					<hr/> 6170

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Cancelled		Cancelled To Whom		New	
Shares.	Name.	Certificate.	Issued.	Certificate.	Shares.
May 1.	*6150 S. A. Boyd, Secy.	#174	Dr. M. Herzstein	#175 out	50
			S. A. Boyd, Secy.	176	6100*
					<hr/> 6150
May 16.	*6100 S. A. Boyd, Secy.	#176	L. F. Young, Secy.	182	6100*
May 22.	*6100 L. F. Young, Secy.	#182	Jeanne L. Hopper	183 out	10
			L. F. Young, Secy.	184	6090*
					<hr/>
May. 31.	*6090 L. F. Young, Secy.	184	Emily M. Jenks	185 out	10
			Clara A. Hutchins	186 "	10
			L. F. Young, Secy.	187	6070*
					<hr/> 6090
June 21.	*6070 L. F. Young, Secy.	#187	Ernest A. Bailey	190 out	10
			L. F. Young, Secy.	191	6060*
					<hr/> 6070
Aug 26.	*6060 L. F. Young, Secy.	#191	T. J. Wilson	192	10
			L. F. Young, Secy.	193	6050*
					<hr/> 6060
1908.					
Mch. 25.	*6050 L. F. Young, Secy.	#193	L. F. Young, Secy.	197	6060*
	10 T. J. Wilson	192			
	<hr/> 6060				
May 25.	*6060 L. F. Young, Tr.	#197			
	190 J. L. Howard	54	L. F. Young, Secy.	200	900
	250 Sidney Smith	72	" "	201	5710
	30 Geo. W. Spencer	74			
	30 R. R. Stockett, Tr.	125	L. R. Roseberry	202	350
	10 Thomas Graham	126			
	10 Jeannie Hamilton	127			
	10 Charles D. Rand	154			
	10 " " "	155			
	10 " " "	156			
	10 " " "	157			
	10 " " "	158			
	30 Ernst E. Evans	160			
	50 " " "	179			
	70 Adam L. Rusell	180			
	150 A. Wenzelburger	196			
	30 D. M. McKay	73			
	<hr/> 6960				<hr/> 6960

Cancelled		Cancelled To Whom		New	
Shares.	Name.	Certificate.	Issued.	Certificate.	Shares.
1907.			E. E. Evans	#68	1000
Jan. 18.	9000 F. A. Losh, Tr.	#11	"	69	150
			"	70	150
			"	71	150
			Sidney Smith	72	250
			D. M. McKay	73	30
			Geo. W. Spencer	74	30
			Helen L. Howard	75	1000
			"	76	1000
			"	77	1000
			"	78	1000
			"	79	1000
			J. L. Schmitt	80	100
			John L. Howard	81	2140*
					<hr/> 9000
Jan. 28.	*2140 J. L. Howard	#81	Jeane S. Schoonmaker	82	50
			Edith S. Howard	83	50
			John L. Howard	84	40
			"	85	2000*
					<hr/> 2140
Mch. 27.	*2000 J. L. Howard	#85	C. S. Girvin	131 out	100
			J. L. Howard	132	1900*
					<hr/> 2000
1908.					
May 25.	*1900 J. L. Howard	132			
	250 J. L. Howard, Tr.	51			
	30 "	52			
	30 "	53			
	150 E. E. Evans	65			
	150 "	66			
	1000 "	68			
	150 "	69			
	1000 Helen L. Howard	75			
	1000 "	76			
	1000 "	77			
	1000 "	78			
	1000 "	79			
	100 J. L. Schmitt	80			
	50 J. L. Schoonmaker	82			
	50 Edith L. Howard	83			
	40 J. L. Howard, Tr.	84			
	250 J. L. Howard, Tr.	188	L. F. Young, Tr.	#199	9150*
					<hr/> 9150

708 *Standard Portland Cement Corporation*

RESULT.					
	Cancelled Shares.	Name.	Cancelled Certificate.	To Whom Issued.	New Certificate. Shares.
1908				Walter H. Cole,	
Dec. 24.	9150	L. F. Young, Secy.	#199	Secy.	#207 15760
	900	"	200		
	5710				
	<hr/>				
	15760				

STOCKHOLDERS.

AS NOW SHOWN BY NORTHWESTERN
BOOKS.

Page.	Names.	Shares.
6	I. A. Bachman.....	15420
8	William J. Dingee.....	15245
9	Edward McGary.....	430
18	Walter H. Cole, Secretary.....	15760
19	Walter H. Coke, Trustee.....	776
28	Earnest A. Bailey.....	10
93	Wm. M. Cannon.....	1
94	Joseph E. Reardon.....	1
94	Thomas W. Firby.....	1
94	Duncan A. McLeod.....	1
95	L. R. Roseberry.....	350
95	Andrew D. Burke.....	5
95	Walter H. Cole.....	2
96	Mrs. Antonue Hansen.....	48
97	Emily M. Jenks.....	10
97	Clara A. Hutchins.....	10
98	L. F. Young.....	3
98	Jeanne L. Hopper.....	10
99	Dr. Morris Herzstein.....	50
99	E. H. Warner.....	50
99	W. P. Warner.....	50
100	R. W. Hills.....	50
100	E. H. Temple.....	10
100	Mrs. Annabella Mary Buckland.....	20
101	Engelbos Wiese.....	20

Page.	Names.	Shares.
101	Kristianna Wiese.....	10
101	A. H. Hills.....	50
102	Newman Bros.....	50
102	Geo. R. Gay.....	20
103	Samuel Martin.....	100
103	C. W. Camm.....	100
103	F. E. Booth.....	175
104	J. B. McNally.....	40
104	Elise Stevens Davis.....	50

Forward.....48928

[496—166g]

Brought Forward.....48928

Page.	Names.	
105	William Jackson Whitney.....	25
“	May Anna Halley.....	25
“	J. A. Sidney.....	10
106	Joseph Marin.....	10
“	C. S. Girvin.....	100
107	The G. Migliavacca Inv. Co.....	100
108	Nat Raphael.....	100
“	R. C. Baird.....	50
109	Frank G. Noyes.....	105
“	Victor M. Reiter.....	10
110	Huanna H. Noyes.....	20
“	Julia R. Noyes.....	30
111	Ellis Lewis.....	25
“	E. W. Doughty.....	20
112	Henrietta E. Clark.....	50
113	Solomin Gump	50
“	Alfred S. Gump.....	20

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Page.	Names.	
114	Katherine E. Murden.....	10
116	Clarissa F. Hamilton.....	220
“	John Moore.....	10
117	H. Brumlop.....	16
118	C. Krarup.....	16
“	Benjamin Bradshaw.....	3
119	Clara Migliavacca.....	10
“	E. W. Churchill.....	7
120	Lawrence Migliavacca.....	20
“	Angelina Migliavacca.....	10

5000

[Endorsed]: Filed Dec. 22, 1911. Southard Hoffman, Clerk. By W. R. Maling, Deputy Clerk.

No. 14,887.

15,249.

In U. S. Circuit Court, Northern District of California.

Evans et al.

and cross-title

Standard P. C. Company.

Complts. EXHIBIT 13,

Cement Co's.

H. M. WRIGHT,
Examiner,
Masters-Referee.

[497—166h]

(Testimony of L. F. Young.)

Q. I notice, Mr. Young, in this memorandum of stock transfers the word "out" frequently written. What is the significance of that word?

A. That was written there by Mr. Pringle in checking it over to indicate that the certificate which that stock represents is apparently out; it has not been cancelled or pasted back in the book; it is still outstanding.

My present recollection is that I have resigned from the Northwestern Portland Cement Company. I became secretary of that company about the middle of May, 1907, at the instance of William J. Dingee. I find that I resigned on May 3, 1909. The book which you exhibit to me is the stock certificate book of the Northwestern Portland Cement Co. I find there certificates endorsed by John L. Howard. Certificate No. 54 is the first one I find. It is for 190 shares. It is endorsed: "For value received I hereby assign the within certificate to Standard Portland Cement Corporation, John L. Howard, trustee. Sig. O. K.: D. C. Norcross. Transfer to L. F. Young, secy. Standard Portland Cement Cor. by L. F. Young, secy." The cancellation marks on the face of it read: "Cancelled May 25, 1908, by issue of certificate No. 200, L. F. Young, secy." As to the references in this book to L. F. Young, secretary, the explanation is this: Where it says: "Transfer to L. F. Young, Secy.," that means L. F. Young, Secretary of the Northwestern Portland Cement Co. The D. C. Norcross who identifies the signature of John L. Howard is the Mr. Norcross who is here present in the court-

(Testimony of L. F. Young.)

room, the secretary of the Western Building Material Company.

The next certificate turned in on May 25, 1908, for cancellation is certificate No. 72 for 250 shares, in favor of [498—166i] Sidney F. Smith. It has this cancellation across it face: "cancel May 25, 1908, by issue of certificate 200, L. F. Young, secretary." It bears the indorsement: "For value received, I hereby assign the within certificate of the Standard Portland Cement Corporation." That was written in typewriting. Then this is in ink: "Sidney V. Smith," and underneath it: "Sig. O. K., D. C. Norcross." And then in typewriting: "Transfer to L. F. Young, Secy. Standard Portland Cement Co. by L. F. Young, Secy." I make the same explanation concerning that certificate as I did in regard to the last one. The language on the back of this certificate in blue typewriting and in the following language: "For value received I hereby assign the within certificate to the Standard Portland Cement Company," over the signature of John L. Howard, trustee, was not written by me, and when I received the certificate, that language was already there. Turning to the next certificate, the blue typewriting on the back of that in the words: "For value received I hereby assign the within certificate to the Standard Portland Cement Corporation," was not written by me, or under my direction, and when that certificate came to me that language was already there. The next certificate is certificate No. 74 in favor of George W. Spencer, for thirty shares. Across the

(Testimony of L. F. Young.)

face of it, it says: "Cancelled May 25, 1908, by issue of certificate No. 200, L. F. Young, secretary." On the back of that, on the top, in blue typewriting, are the words, "for value received I hereby assign the within certificate to the Standard Portland Cement Corporation"; and also on the back of it, down below the blue typewriting in ink appears: "George W. Spencer" and "Sig. O. K. D. C. Norcross. Transfer to L. F. Young, secretary. Standard Portland Cement Corporation, by L. F. Young, Secretary." The various explanations which I have heretofore given with reference to similar indorsements on former certificates are applicable [499—167] to this also.

Mr. OLNEY.—If the Court please, so as to shorten this matter, we will admit that the following certificates, standing in the following names and for the following shares, were endorsed in the same manner as these that have been read representing certificate 54, John L. Howard, Trustee, 190 shares. Certificate No. 72, Sidney V. Smith, 250 shares. Certificate No. 74, George W. Spencer, 30 shares. Certificate No. 125, T. R. Stockett, Trustee, 30 shares. Certificate No. 126, Thomas Graham, 10 shares. Certificate No. 127, Gene E. Hamilton, 10 shares. Certificate No. 153, Charles D. Rand, 10 shares. Certificate No. 155, Charles D. Rand, 10 shares. Certificate No. 156, Charles D. Rand, 10 shares. Certificate No. 157, Charles D. Rand, 10 shares. Certificate No. 158, Charles D. Rand, 10 shares. Certificate No. 160, Ernest E. Evans, 30 shares. Certificate No. 179, Ernest E. Evans, 50 shares. Cer-

(Testimony of L. F. Young.)

tificate 180, Adam L. Russel, 70 shares. Certificate No. 196, A. Wenzelburger, 180 shares.

Mr. BROBECK.—What is the admission with respect to that?

Mr. OLNEY.—They are all endorsed in the same way.

Mr. DUNNE.—What about Certificate No. 73?

Mr. OLNEY.—Yes, Certificate No. 73, D. M. McKay, 30 shares.

WITNESS.—Except that it is written in handwriting instead of typewriting on the top.

Mr. BROBECK.—It does not appear to be in the handwriting of McKay.

Mr. DUNNE.—There is somebody's handwriting there.

Mr. NORCROSS.—That is Mr. McKay's handwriting; at least I am pretty sure it is. Let me look at it. Yes, that is his handwriting. He is here in the courtroom and can identify it himself.

Mr. OLNEY.—The first endorsement is entirely in the handwriting of Mr. McKay. [500—167a]

Mr. DUNNE.—And does your admission go so far, Mr. Olney, as to include the various explanations which the witness has given as to the various endorsements on the back of these certificates?

Mr. OLNEY.—It simply includes the statement that he did not put these endorsements on there.

Mr. DUNNE.—And that they were taken there when he received the certificates?

Mr. OLNEY.—Wait a moment, I beg your pardon. It includes simply this: that the first endorsement,

(Testimony of L. F. Young.)

namely, the endorsement to the Standard Portland Cement Corporation was on there when he received the certificate.

Mr. DUNNE.—And does it also include the fact that Mr. Norcross, the person who O.K'd the various signatures, was the Mr. Norcross of the Western Fuel Co. and the Western Building Material Company—the same person?

Mr. OLNEY.—Yes.

Mr. DUNNE.—And the cancellation date, May 25, 1908, as it appears for the certificates themselves?

Mr. OLNEY.—The certificates all show the cancellation date as of May 25, 1908.

Mr. DUNNE.—And does it also include the fact, as stated by the witness, with reference to the use of the word “Secretary”?

Mr. OLNEY.—No.

Mr. DUNNE.—Mr. Young, I will ask you the general question, what explanation have you to make for the use of the word “Secretary” upon all of these various certificates of stock which have just been referred to?

A. The use of the word “Secretary” on the certificate, written after my name is to indicate that that stock is in the treasury of the Northwestern Portland Cement Co. [501—167b]

Q. While we are speaking about that word “Secretary” I wish to ask you this: I have noticed in the course of this tabulated scheme exhibiting the stock movement the phrase “L. F. Young, trustee”; I would like to have you explain that at the same time.

(Testimony of L. F. Young.)

A. The word "Trustee" was originally intended to designate the stock which stood in my name as trustee for Messrs. Dingee and Bachman, but at the end it became much confused and it became synonymous with treasury stock.

Mr. DUNNE.—It is admitted that, if your Honor please, certificates No. 132, 51, 52, 53, 65, 68, 69, 75, 76, 77, 78, 79, 80, 82, 83, 84 and 188 were all cancelled on May 25, 1908. That is correct, is it, Mr. Olney?

Mr. OLNEY.—Yes.

The WITNESS.—(Continuing.) Certificate No. 132 is for 1,900 shares in favor of John D. Howard. It is cancelled May 25, 1908, by issue of certificate No. 199 L. F. Young, secretary. It is endorsed in the handwriting of John L. Howard, "May 9, 1908, transfer to the order of William J. Dingee, John L. Howard," and immediately below that in typewriting "Transfer to L. F. Young, trustee, William J. Dingee, by L. F. Young, his attorney in fact." The next is certificate No. 51 for 250 shares in favor of John L. Howard, trustee; cancelled May 25, 1908, by [502—167c] issue of certificate 199. Indorsed, in the handwriting partially of Mr. Norcross, "transfer to the order of William J. Dingee, May 9, 1908"; and in the handwriting of Mr. Howard, "John L. Howard, trustee"; and in typewriting, "transfer to L. F. Young, trustee. William J. Dingee, by L. F. Young, his attorney in fact." The portion "transfer to the order of William J. Dingee, May 9, 1908," is in the handwriting of Mr. Norcross; and the signature "John L. Howard, trustee," is in the handwrit-

(Testimony of L. F. Young.)

ing of Mr. Howard. No. 52 is for thirty shares, and is similar to the others.

Mr. OLNEY.—I will state, Mr. Dunne, that I am more or less certain that they are all the same. We can look those up and make admissions on it afterwards. That will save time.

Mr. DUNNE.—Very well.

The WITNESS.—(Continuing.) Where it says, “transfer to L. F. Young, trustee, William J. Dingee by L. F. Young, his attorney in fact,”—that was put on at my direction after the certificates came into my possession. I directed a young lady to typewrite it and I signed it.

The MASTER.—What are those certificates you are speaking of now? This is not a repetition of the other matter, is it?

Mr. OLNEY.—These are the promotion stock certificates as distinguished from the bonus stock.

The WITNESS.—(Continuing.) They are all of the same date. They are all cancelled on the same date, May 25, 1908. These indorsements were made upon these shares of stock that I have last referred to, the second endorsement, the one under Mr. Howard’s endorsement, under the direction of William J. Dingee, under these circumstances. I was directed, upon the receipt of this stock to put back one for one, or ten shares for each bond, into the treasury of the Northwestern Portland Cement Company, and to put back the balance of it in a certificate in my name as trustee for William J. Dingee and Irving A. Bachman. We had [503—168] at that time a large

(Testimony of L. F. Young.)

safe deposit box which had 8 or 10 different compartments or 10 boxes, and each company was labeled and in each of these boxes I had the separate treasury bonds of each company. That is, at that time I had the treasury bonds of the Santa Cruz Portland Cement Company. I had treasury bonds of the Atlantic Portland Cement Company and treasury bonds of the Northwestern Portland Cement Company. I was instructed to place these bonds back in the treasury box with the balance of the treasury bonds of the Northwestern Portland Cement Company, and I did so. As to when this stock came into my possession, I have seen a letter here which will give the date—I saw the carbon copy of it, the original I have not; its date is May 4, 1908. The stock there designated and the bonds there designated I received either about the 4th or 5th of May, 1908.

These bonds have never been listed among the assets of the Standard Portland Cement Company. These notes have never been charged among the liabilities of the Standard Portland Cement Corporation; and the stocks have never been listed among the assets of the Standard Portland Cement Corporation.

You asked me on what date those bonds came into my possession. It occurs to me now that the resolution was dated May 5, so it must have been after that date. I surely would not take them before that time; it was between May 5th and May 25th; there is a letter dated May 4th enclosing stocks and bonds. My recollection is that they were divided up in blocks. I

(Testimony of L. F. Young.)

did not receive them all at one time; it was about that period but I could not say as to the exact date; it was within a very few days after the letter of May 4th—I should say May 5th.

The \$1,800 note which was referred to in the course of the testimony of Mr. Howard was never listed as an obligation of the Standard Portland Cement Company.

The specific instructions which I was given by Mr. [504—169] Dingee as to the listing or nonlisting of these stocks and bonds were that they were not to be put on the books; they were to be taken care of by him before they ever became due—by himself personally.

My attention was first called to Mr. Evans by receipt of a letter dated Vancouver, December 20, 1907, written by E. E. Evans to William J. Dingee. At that time Mr. Dingee's office was on the third floor of the Crocker Building of this city. We had offices on the eastern end of the building and his office was the most westerly office. Mr. McGary's office intervened and then came mine. At that time Mr. Dingee and I saw each other constantly. I have here the letter of Dec. 20th, 1907, to which I have referred. This is it. It is an original letter dated Dec. 20th, 1907, signed by E. E. Evans, a copy of which is in Mr. Evans' deposition. It came at a time when I was opening the mail. I opened that with the balance of the mail and I later called Mr. Dingee's attention to it, and asked him if he wanted me to answer it or if he was going to give the statement

(Testimony of L. F. Young.)

they asked. If I remember correctly, he indulged in a good deal of profanity and then he said, "We won't do anything with it now; we will wait a little." I kept the letter on my desk and several days after that I asked him if he was still of the same mind or if I should answer it, and he said "No." At a later date we received another letter which contained a copy—a letter dated January 6, 1907. This is the second letter and attached copy; all of this came by registered mail. This second letter came at a time when our finances were very severe; and by "severe" I mean that in November, 1907, the panic was actually on full speed, and we were having a great deal of trouble and difficulty in getting money. Up to that time, nobody in the Northwestern had destroyed its general serenity, but when this came upon the horizon, Mr. Dingee was very much [505—170] provoked and excited about it. I again asked him if I should answer the letter. I think he said he would see. Then the matter being called again to his attention, he said, "No," he would take it up with Mr. Howard. In the month of February, before the 10th of February, 1908, Mr. Wenzelburger called at the office and presented certificate No. 64 of the Northwestern Portland Cement Company and wanted it transferred into his name. As this stock stood in the name of Ernest E. Evans, I asked him if he came on behalf of Mr. Evans, and he said no, he did not. He said he just wanted that transferred into his name. Then he presented me a card. I see there is one card here with his name on it. I thought

(Testimony of L. F. Young.)

he presented a card saying, "certified accountant," but I might have looked that up in the telephone directory afterwards. After this stock was transferred into his name he wanted to examine the books of the Northwestern, and wanted to know if he could do it. I told him I would have to see Mr. Dingee. I consulted Mr. Dingee on the point. Mr. Dingee's attitude toward the examination of the books of the Northwestern Portland Cement Company was that he was excited and did not want to have them examined. He asked me if Mr. Wenzelburger had a right to examine them, and I told him that he had. He said that he knew of many cases where they tried to examine books and was prevented from doing so. I said, in my judgment he had a right to do it and should be allowed to do it. Mr. Dingee was not satisfied with my judgment in the matter and asked me to inquire from Mr. McEnerney as to what he thought about it. I did so and Mr. McEnerney said, "Let him see them." I reported that to Mr. Dingee and provision was made for the examination of the books. Mr. Wenzelburger made the examination. I supplied him with every book he wanted and with all the information that I had concerning them. The only limitation that I put upon him was that everything he copied I wanted to see. [506—171] I wanted to see everything he made a copy of. Before he left he handed me a lot of material and I looked it over. Then he went away and I never saw him again except casually on the street. He was occupied there about a week, from the beginning to the end, and after his work had ceased and he had gone away this Evans

(Testimony of L. F. Young.)

matter was again brought to my attention by reading a letter from Mr. Evans which contained reference to misappropriation by Mr. Dingee of the funds of the Northwestern and his criminal liability. I believe I would recognize that letter again; and the letter which you show me dated March 4, 1908, is contained in the deposition of John L. Howard, beginning at line 24, page 50, and ending on line 24, page 51, as the original of that letter that I saw. I see by this that it was addressed to John L. Howard. My original impression was that it was addressed to Mr. Dingee, but the letter in all other respects conforms to the letter I have in mind. When I saw that letter I was in the office in the Crocker Building. It was exhibited to me by Mr. Dingee; he laid it down on my desk with a burst of profanity. I read it, and then later went into his room and asked him what he was going to do about it. He didn't know what he was going to do about it, and then he said, again that he would have to see Mr. Howard. My recollection is that I kept that letter in the pigeon-hole in my desk for quite a period of time. After that, I believe it was placed in our files, or in the personal files of Mr. Dingee; I don't know which. I remember reading the letter over and discussing it with Mr. Cole who was the assistant secretary at that time. I could not state how long the letter remained in the files, but my recollection is that I gave it to Mr. Cole to file. Mr. Dingee continued to keep the offices there until about November 18, 1908, when he left his offices from there to the Mills Building and had several of

(Testimony of L. F. Young.)

the employees there go through the files and pick out such papers and letters as related to him and took them to his office. After that I did not see that letter [507—172] any more.

Save and except the bonds and stocks of the Northwestern Portland Cement Co. which are concerned in this suit and which it is claimed in this suit were sold to the Standard Portland Cement Corporation, the Standard Portland Cement Corporation did not ever at any other time or under any other circumstances purchase any other bonds or stocks of the Northwestern Portland Cement Company.

During the winter of 1907-8 the salaries of Mr. Dingee and Dr. Bachman, then officers of the Standard Portland Cement Corporation and the Santa Cruz Portland Cement Co., were reduced considerable, and I think the balance of the salaries were not paid. I myself went between 13 and 14 months without any salary whatever during that time. I think Mr. Frederick R. Muhs, in the office, went about 18 months—and Mr. Cole was many months behind in his salary. As to the condition of the interest account on the bonded indebtedness of the Standard Portland Cement Corporation at that time, I think in November payment in the latter part of the year was a week or two behind. I think that was before the holidays. They were a month behind them. It was payable on the 1st of October, but the holidays began in November, as I recollect. The dividends were paid up to October 15th, I think. There may have been one that was stopped. September 15th

(Testimony of L. F. Young.)

may have been the last. These companies were loans from the bank about that time wherever possible. We were getting money wherever possible, and I took part in that myself. I went around to various banks. That was the first part of 1908. I discounted acceptances of the Western Building Material Company at such banks as the Anglo, the American National, and the Bank of California and the Mercantile Trust Co. I borrowed about \$50,000 from the Metropolis Trust Company, I think that was in April, 1908, according to my recollection. As to my observation of Mr. Dingee's mental condition with reference to these Evans' matters, at that time, everything was going wrong, [508—173] and this friction of Evans upset him very much. He was very much upset at the time Mr. Howard contemplated or threatened discontinuing his services as selling agent, and with this additional friction—particularly as these people were friends of Mr. Howard, and Mr. Howard was his sole source of supply of money as far as the sales of cement were concerned—he was very much excited about it; and when I say “these people,” I refer to the people who are plaintiffs in this suit, Evans, Coleman & Evans, Rand, Stockett, Graham and those people. About the middle of February, the relations between Mr. Howard and Mr. Dingee were strained in the sense that there was some contemplation of cancelling the selling agency but other than that I would say that their relations were very friendly. They saw each other constantly. They were lunching together, and

(Testimony of L. F. Young.)

were with each other a great deal. This letter which you exhibit to me is in the handwriting of Mr. Dingee.

Mr. DUNNE.—I offer this letter in evidence.

Thereupon said letter was then and there received and read in evidence in the above-entitled cause and is in words and figures as follows, to wit:

“San Francisco, Cal., 2/17.

Dear Mr. Howard: I tried your office Saturday but you were out of the City. I am unable to get around much today as I had a second operation on my eye Saturday, and I have to go again today to the Dr. but I desire to say that we do not want any cancellation and I hope you will quit thinking about it and lunch with me tomorrow when we will fully discuss it.

Sincerely,

W. J. DINGEE.”

WITNESS.—(Continuing.) At that time, in the middle of February, 1908, Mr. Dingee and I occupied adjoining offices, as I have related, in the Crocker Building with Mr. McGary’s room intervening.

I left San Francisco for Placerville on Saturday, April 10th, 1908; and between the middle of Feb., 1908, and the 10th of April, 1908, when I departed for Placerville, I had conversation with [509—174] Mr. Dingee touching this Evans difficulty. We were discussing Mr. Evans’ desire to get notes or to get his bond matter straightened out, and Mr. Dingee told me that he would take this up with Mr. Howard; and then at a later date, I should say in the

(Testimony of L. F. Young.)

latter part of March, he told me that he intended giving his personal notes for those, to be endorsed by the Standard Portland Cement Corporation. He asked me about that time, or very shortly after, for a copy of the articles of incorporation of the Standard Portland Cement Corporation, which I delivered to him. The letter which you exhibit now to me is in the handwriting of William J. Dingee and the pencil memorandum beneath Mr. Dingee's signature is in the handwriting of Mr. Howard, and the "D. C. N." *standard* for D. C. Norcross.

Mr. DUNNE.—I offer this letter in evidence.

Mr. OLNEY.—No objections.

Thereupon said letter was received and read in evidence in the above-entitled cause and is in words and figures as follows, to wit:

"San Francisco, Cal., Apl. 10, 1908.

John L. Howard, Esq.,
City.

Dear Mr. Howard: Your favor of the 9th inst., enclosing form of note to be given in the matter of the purchase of the Standard Portland Cement Corp. of bonds and stock of the Northwestern Portland Cement Co., also copy of resolution is received. The form of note is, of course, satisfactory, but as to the resolutions, would it not be better to have resolution with each purchase, and if not, to limit the resolution to the purchase of so many?

Mr. Young, the Secretary, has gone to Placerville, but will be here Monday, when we can take up the

(Testimony of L. F. Young.)

matter and close it up the [510—175] first of the week.

Yours truly,
WILLIAM J. DINGEE."

Below which, in pencil, in the handwriting of John L. Howard, appears the following: "D. C. N. Can you give me an accurate list?"

(It is stipulated that the "D. C. N." stands for D. C. Norcross.)

The WITNESS.—(Continuing.) On my return from Placerville, when I went into my office, there were on my desk a great many letters and among them was a letter, or at least a copy of this note, and a copy of the resolution. I called Mr. Dingee's attention to the fact that this was not the form which he told me the transaction was going to take. He then said that they didn't want his note, they wanted a Standard note; they concluded the Standard didn't have a right to indorse notes, and thereupon the Evans transaction would take the form of a purchase through the Standard. The form of note and resolution which I discovered upon my desk upon my return from Placerville was the note and copy of the resolution referred to in this letter of April 10, 1908.

I do not recall any conversation with Mr. Dingee about this time upon the subject matter of his diversion of the corporate funds [511—175a] of these companies, and especially the Northwestern. I had a conversation with him about the question of putting the Northwestern money into the Santa Cruz. This

(Testimony of L. F. Young.)

conversation was had in the office, just Mr. Dingee and myself being present. My recollection is that it rose out of this letter of March 4, to which reference has already been made in the course of my testimony. It was on that subject. The question of whether or not that was the right thing to do—arose. He asked me what I thought about it, and it finally took this form. He said, that we had better have the Santa Cruz execute a note to the Northwestern. He also said, we better have the Santa Cruz execute a note for the Bellingham Bay and British Columbia Railway stock. The instructions were given me by him. There is a pencil memorandum there. This is it, it is in the handwriting of William J. Dingee, and it reads thus: “get”—the word “get” having a couple of pencil lines drawn through it, and then it reads “authorize and make note Santa Cruz Co. to Nwester-n for am't due, also cost of R. R. stk.” Nothing was done with that. That matter was dropped after the plan of giving these notes for the bonds and stock was taken up. The Northwestern Portland Cement Company never was taken over by the Crocker interests and I presume is in the control of Mr. Dingee. He has the stock for it yet. The date of the pledge of the Bellingham Bay stock was February 10, or February 12, 1908; and it was pledged on account of the indebtedness of the Santa Cruz Portland Cement Company and the Atlantic Portland Cement Company to the American Bridge Company of New York.

(Testimony of L. F. Young.)

Cross-examination.

In regard to this note of March 4, 1908, by Mr. Evans to Mr. Howard which I saw in Mr. Dingee's possession, my recollection was that it was a letter written by Mr. Evans to Mr. Dingee directly until my memory was refreshed by seeing a copy of the letter here. There was no notation on the letter of any sort in handwriting, [512—176] besides the mere letter itself, that I can recollect; it is the substance of the letter I recall and not the address. The Western Building Material Co. during this time was the sole source of supply for the cement companies of moneys, so far as their sales were concerned. The Western Building Material Company always paid its bills promptly, except for the question of claims that arose between us and which produced the friction in February, 1908. It claimed that the cement companies were not allowing and paying promptly its charges against them for sacks and one thing and another. We had a special account for unsettled claims, and the Western Building Material Company claimed that that account was not being given proper attention, and accordingly they held up payments on the sales contract until something was done on that account. With this exception, I should say that the moneys that were due the cement companies under the sales contract were paid promptly. I know of no occasion when they were not. I know it was their credit and the question of getting these acceptances that counted and not ours. When we were getting

(Testimony of L. F. Young.)

these acceptances discounted, it was the credit of the Western Building Material Company that counted, and not ours. I can remember an instance when I went to the Bank of California to get one discounted. All they wanted to consider was the Western Building Material Company. They said at the bank, "They are all right, and we will take it on their acceptance." During this period, except for the time during which the Western Building Material Company refused to pay because of this counterclaim, that company was not only paying its bills promptly but was discounting our sales for us; it was assisting the cement companies.

Mr. OLNEY.—I offer in evidence this letter dated May 4th, 1908, if the Court please, as Defendant's Exhibit "A."

Thereupon said letter was read in evidence in the above-entitled action and is in words and figures as follows, to wit: [513—177]

[Defendants' Exhibit "A."]

"May 4, 1908.

Standard Portland Cement Corporation,
Crocker Building,
City.

Dear Sirs:

NORTHWESTERN PORTLAND CEMENT
COMPANY.

In accordance with understanding between Mr. Dingee and Mr. Howard, I have prepared notes as

listed below for execution by the Standard Portland Cement Corporation.

These notes are to be endorsed by Mr. Dingee, and he is to waive notice of protest.

Following are the notes dated May 1st, 1908, payable on or before one year from date with interest at six per cent per annum.

(In ink) Charles D. Rand.....	5,000
Evans, Coleman & Evans..	\$30,000
Sidney V. Smith.....	25,000
Western Building Material	
Co.....	19,000
Catherine E. Spencer....	3,000
T. R. Stockett, Trustee....	3,000
Thomas Graham	1,000
A. S. Hamilton.....	1,000
	<hr/>
	\$87,000

(In pencil) D. M. McKay.....	3,000	90,000
------------------------------	-------	--------

Please have these notes ready for delivery to me on Tuesday the 5th inst. when I will deliver you eighty-seven bonds of the Northwestern Portland Cement Company, numbered as follows:

Numbers 1, 2 & 3.....	3
“ 213 to 217 inc.....	5
“ 7 to 50 inc.....	44
“ 123 to 157 inc.....	35
	—
	87
(In pencil) 4, 5 & 6.....	3
	—
	90

732 *Standard Portland Cement Corporation*

I will also deliver you the following stock certificates, which have been endorsed: [514—178]

Number.	In Name of.	No. of Shares.
54	John L. Howard, Tr.	190
72	Sidney V. Smith	250
74x53—('52' in pencil)	Geo. W. Spencer	30
125x53—('53' in pencil)	T. R. Stockett, Tr.	30
126	Thomas Graham	10
127	Jeannie Hamilton	10
154	Charles D. Rand	
155	“ “ “	10
156	“ “ “	10
157	“ “ “	10
158	“ “ “	10
160	Ernest E. Evans	30
179	“ “ “	50
180	Adam L. Russell	70
196	A. Wenzelburger	150

	Total	870	
(In pencil) 73	McKay	250	870
		30	30

900 (in
pencil)

I will also deliver you certificate No. 188 in name of John L. Howard, Trustee. This I should like to have Mr. Dingee receipt for, as it is stock which he personally gave to Ernest E. Evans.

I will also deliver you a deed for certain property which stands in the name of John L. Howard.

For this Mr Howard is to receive your note for Eighteen Hundred Dollars dated May 1st, at six per cent, payable on or before one year.

Will you please have a certified copy of the attached resolution made as arranged.

The other thirteen bonds which make up the One Hundred Thousand Dollars subscribed through Mr. Howard are expected here in a few days, and will be presented as soon as received.

Yours truly,

DCN."

And while the signature is not here, Mr. Dunne, I will simply read it in: it is "D. C. Norcross."

I would state for the information of the Court that the following appear in the letter, which is otherwise typewritten, by way of interlineation: [515—178a]

"Charles D. Rand.....5,000
D. M. McKay.....3,000
and extended out 90,000."

Then, following the list of bonds to be delivered, the following is in lead pencil, "4 5 & 6," and extended out the figure "3," with a line under it and the summation "90."

In the list of stock certificates, following the number "74," the number "52" is interlined; and following the number "125" the number "53" is underlined; and following the list of stock certificates to be delivered is the interlineation "73," McKay, 30"

(Testimony of L. F. Young.)

and off to one side are the figures "870" and "30," with a pencil line drawn underneath and the figures "900." There is also under the figure "870" the figure "250," but I don't know what that means.

Mr. DUNNE.—I would like to have the Reporter's notes show that the figures "250" are below the figures "870" and above the figures "30." [516—178b]

lines 14 of page 442 and line 6 of page 445.)

The WITNESS.—(Continuing.) Following the receipt of that note by a meeting of the Board of Directors of the Standard Portland Cement Corporation was held on May 5, 1908, and a resolution was passed relative to this matter, and within two or three days thereafter Mr. Norcross called in accordance with this letter of May 4th and handed to me the stocks and bonds that are specified in the letter. He simply came in the office and saw Mr. Cole, and Mr. Cole brought him in my room as I recall the transaction. I would say it took place like this. Mr. Norcross went into the entrance room, and Mr. Cole would be, say, about there (indicating), and he had these bonds and stock for delivery. Mr. Cole came in and saw me and told me he was there and he brought him into my room, as I recollect the transaction, and the exchange of bonds and stocks and notes took place there. I handed to Mr. Norcross at the time this certified copy of the resolution of the Board of Directors of the Standard Portland Cement Corporation. This is my signature. I handed it to him at the time I delivered the notes. I have in mind

(Testimony of L. F. Young.)

the fact that these notes were back dated. How long back I cannot say, whether it was a day or a week. I thought the notes were dated May 4. I know that they were back dated; they are dated May 1st. At this interview which I had with Mr. Norcross at which he handed over to me the bonds and stocks that were referred to in the letter of May 4, I handed to him this certified copy of the resolutions of the Board of Directors of the Standard Portland Cement Corporation, and I should say that I did hand over the notes of the Standard Portland Cement Corporation specified in the letter. I remember checking them off and counting the bonds and the stock. I delivered the notes of the Standard Portland Cement Corporation at that time to Mr. Norcross, and it is my recollection that those notes were supposed to be in accordance with the letter of May 4, [517—178c] 1908. My recollection from going over the stock-book yesterday is that each of these certificates as it came to me was indorsed to the Standard Portland Cement Corporation—that I received them in the form in which they are there indorsed, exclusive of the second indorsement. The indorsement made by me was made subsequently. Otherwise they were in that condition. They did not come to me indorsed in blank.

Mr. OLNEY.—I desire to introduce in evidence, if the Court please, this certified copy of the resolution.

Thereupon said certified copy of said resolution was received and read in evidence in the above-en-

titled action, and is in words and figures as follows, to wit:

[Defendants' Exhibit "B."]

"THIS IS TO CERTIFY, THAT at a special meeting of the Board of Directors of the STANDARD PORTLAND CEMENT CORPORATION, duly called and held on the 5th day of May, A. D. 1908, at which meeting a majority of said Board was present, the following resolution was unanimously adopted:

RESOLVED: That the President or the Vice-President or either of the Vice-President of this Corporation be and he is hereby authorized and directed on behalf of this Corporation to buy One Hundred (100) bonds of the NORTH-WESTERN PORTLAND CEMENT COMPANY, for one hundred thousand dollars (\$100,000), together with the shares of stock of said Company which *share* have heretofore been issued to the holders of said bonds in the proportion of one (1) share of stock for each and every hundred dollars of the amount of said bonds. And he is further authorized to give the obligation or the obligations of this Corporation in payment therefore to each person, or persons, from whom such bonds and shares shall be bought, which obligations shall be executed by him under the name of this Corporation, and attested by the Secretary under the corporate seal, and shall be made payable on or before one (1) year after May 1st, 1908, and shall bear interest at the rate of six per cent (6%) per annum, from said date until paid, interest to be made payable semi-

(Testimony of L. F. Young.)

annually, and to be compounded if not so paid. He is further authorized when such obligation or obligations shall become due, and if then unpaid, to renew the same from time to time until the amount due is paid in full.

IN WITNESS WHEREOF, The Secretary of said STANDARD PORTLAND CEMENT CORPORATION has hereunto set his hand officially and affixed the seal of said Corporation, this 5th day of May, A. D. 1908.

(Official Seal)

L. F. YOUNG,
Secretary.

STANDARD PORTLAND CEMENT CORPORATION." [518—179]

And the seal of the Standard Portland Cement Corporation attached.

The MASTER.—It will be Defendant's Exhibit "B."

Mr. OLNEY.—Q. Now, I exhibit to you what purports to be a note of the Standard Portland Cement Corporation, in favor of Evans, Coleman & Evans and ask you if that is one of the notes that were so delivered.

A. It is. It is dated May 1st, 1908, for \$30,000.

Mr. OLNEY.—I will offer the note in evidence and read it into the record:

(Testimony of L. F. Young.)

[Defendants' Exhibit "C."]

"May 1/09" (in red pencil writing).

"San Francisco May 1st, 1908.

For value received the Standard Portland Cement Corporation promises to pay to the order of Evans, Coleman and Evans, on or beofre one year from and after May 1st, 1908, the sum of Thirty Thousand Dollars, with interest thereon from said day until paid at the rate of six per cent per annum, payable semi-annually, and if not so paid to be compounded.

STANDARD PORTLAND CEMENT CORPORATION,

By WILLIAM J. DINGEE,

Vice-Presd't.

By L. F. YOUNG,

Secretary."

And the seal of the corporation attached.

The MASTER.—I will likewise mark that, Mr. Olney.

Mr. OLNEY.—Yes, your Honor, I just want to get in a little more in connection with it.

Q. Now, Mr. Young, I notice on this note this endorsement:

"Irving A. Bachman, William J. Dingee," and below that is this endorsement:

"For value received, I hereby waive presentment, demand, protest and notice of nonpayment of within note.

WILLIAM J. DINGEE,

IRVING A. BACHMAN."

(Testimony of L. F. Young.)

I ask you if these endorsements were on the note at the time they were delivered?

A. They were. [519—179a]

Mr. DUNNE.—Mr. Olney, I would like to have all the markings on that note read into the record, if you don't object. If you will allow me, however, I can read them into the record now. On the face of this note is stamped:

“B. of M.

B. C. 4795.

(4795

Vancouver.

in red pencil.)

“(RECEIVED”—followed by an unintelligible word—“ANGLO & LONDON PARIS NATIONAL BANK.”)

On the back I find the name written, “Evans, Coleman & Evans.” I will ask you, Mr. Olney, if that is the authorized signature, of Evans, Coleman & Evans.

Mr. OLNEY.—Yes.

Mr. DUNNE.—And below that is a stamp reading as follows:

“Pay to the order of The Anglo & London Paris National Bank of San Francisco, Cal., Bank of Montreal, Vancouver, B. C. C. SWEENY, Manager.”

And the further stamp as follows: “Received”—followed by an unintelligible word—“Anglo & London Paris National Bank.”

Mr. OLNEY.—Q. None of those writings, Mr. Young, as read by Mr. Dunne, were on there at the time the note was delivered?

A. They were not.

(Testimony of L. F. Young.)

The MASTER.—That will be marked Defendants' Exhibit "C."

Mr. OLNEY.—Q. I will now show you, Mr. Young, what purports to be the note of the Standard Portland Cement Corporation, dated May 1st, 1908, in favor of Charles D. Rand, for \$5,000.

A. My answer to that is the same.

Q. Your answer as to that is the same in all respects?

Q. I also show you a similar note, in favor of T. R. Stockett, Trustee, for \$3,000. I also show you another note in favor of Thomas Graham, for \$1,000. I will ask you if your testimony with regard to the other notes will apply to these also? [520—179b]

A. It is the same in each case.

Mr. OLNEY.—We offer these in evidence, if the Court, please as Defendants' Exhibit "D," "E" and "F."

The MASTER.—And you desire that they shall be spread at length into the record?

Mr. OLNEY.—Yes.

Mr. DUNNE.—I would like to have it appear plainly that on the back of the Rand note I find a similar stamp of the Bank of Montreal of Vancouver to the stamp of that Bank which appears on the Evans note.

Mr. OLNEY.—We also desire in that connection to have it appear that the note is endorsed in blank by Charles D. Rand.

Mr. DUNNE.—Yes, that is correct.

Mr. OLNEY.—That is his signature.

Mr. DUNNE.—Very well, if you say so. And on the back of the Thomas Graham note the following endorsement appears: “Thomas Graham, by John L. Howard, his attorney.” And on the back of the Stockett note the following endorsement appears: “T. R. Stockett, Trustee, by John L. Howard, His Attorney.”

The MASTER.—The note to Rand will be marked Defendants’ Exhibit “D”; the note to Stockett, Trustee, will be marked Defendants’ Exhibit “E”; the note to Graham will be marked Defendants’ Exhibit “F.”

Mr. DUNNE.—If the Court please, I would like to have all these notes, with every marking upon them, appear in the record at this point. o

Mr. OLNEY.—Very well, I will let the Reporter have the notes so that he can make exact copies of them.

The MASTER.—Very well, the notes will be copied, with everything appearing upon them, into the record. [521—179c]

[Defendants’ Exhibit “D.”]

“San Francisco, May 1st, 1908.

(In ink.) \$5304.50 (underlined in red pencil).

For value received, the Standard Portland Cement Corporation promises to pay to the order of Charles D. Rand, on or before one year from and after May 1st, 1908, the sum of—Five Thousand Dollars, with interest thereon from said day until paid, at the rate of six per cent per annum payable semi-annually

and if not so paid to be compounded.

STANDARD PORTLAND CEMENT CORPORATION.

(In ink.)

By WILLIM J. DINGEE,

Vice-Pres'dt.

(In ink.)

(Seal)

By L. F. YOUNG,

Secretary."

(In ink:) "\$5000.

Int. from May 1/08 to May 1/09. 304.50

\$5304.50"

"B. of M. B. C. 4662 Vancouver" ("4662" in red pencil writing.)

(Endorsed on reverse side:)

"Charles D. Rand.

(In ink:) Irving A. Bachman.

William J. Dingee.

For value received, I hereby waive presentment, demand, protest and notice of nonpayment of within note.

(In ink:) WILLIAM J. DINGEE.

IRVING A. BACHMAN.

(In red rubber stamp:) "Pay to the order of The Anglo & London Paris National Bank of San Francisco, Cal. Bank of Montreal, Vancouver, B. C. C. SWEENY, Manager."

"Pay to the order of any chartered bank in Canada. The Bank of Montreal, Vancouver, B. C. C. SWEENY, Manager."

(This is scratched out in lead pencil, being stamped in green rubber stamp.)

(Endorsed across face of note:)

“Protested for Nonpayment at San Francisco,
Cal., May 1st, May 1st, 1909. [522—179d]

HARRY J. LASK,
Notary Public in and for the City and County of
San Francisco, State of California.”

(“Protested for non-
at San Francisco, Cal. 1909.

.....,
Notary Public in and for the City and County of
San Francisco, State of California,” being in
purple rubber stamp, and “Payment May 1st,
9, Harry J. Lask,” being written in ink.)

[Defendants' Exhibit “E.”]

“San Francisco, May 1st, 1908.

For value received the Standard Portland Cement
Corporation promises to pay to the order of T. R.
Stockett, Trustee, on or before one year from and
after May 1st, 1908, the sum of Three thousand Dol-
lars, with interest thereon from said day until paid,
at the rate of six per cent per annum, payable semi-
annually, and if not so paid to be compounded.

(“T. R. Stockett, Trustee,” and words, “and
after,” written in ink.)

STANDARD PORTLAND CEMENT COR-
PORATION.

By WILLIAM J. DINGEE (In ink.).

Vice-Pres'dt.

(Seal)

L. F. YOUNG, (In ink.)

Secty.”

(Endorsed on reverse side:)

“William J. Dingee. (In ink.)

.Irving A. Bachman. (In ink.)

For value received, I hereby waive presentment, demand, protest and notice of nonpayment of within note.

WILLIAM J. DINGEE,
IRVING A. BACHMAN,
T. R. STOCKETT, Trustee,
By JOHN L. HOWARD,
His Attorney.”

(The above four names, including “By John L. Howard, His Attorney” are written in ink.)

(Endorsed in red rubber stamp:)

“Protested for nonpayment at San Fran, California, this 1st of May, A. D. 1907. P. F. Kennedy, Notary Public.” [523—179e]

[Defendants' Exhibit “F.”]

“San Francisco, May 1st, 1908.

For value received the Standard Portland Cement Corporation promises to pay to the order of Thomas Graham on or before one year from and after May first, 1908, the sum of One Thousand Dollars, with interest thereon from said day until paid, at the rate of six percent per annum, payable semi-annually, and if not so paid to be compounded.

(Testimony of L. F. Young.)

(‘May 1st, Thomas Graham,’ and after ‘One thousand’ are written in ink.)

STANDARD PORTLAND CEMENT CORPORATION.

By WILLIAM J. DINGEE, (In Ink.)

Pres’dt.

(Seal)

L. F. YOUNG, (Ink.)

Secretary.”

(Endorsed on reverse side:)

“William J. Dingee. (In ink.)

Irving A. Bachman. (In ink.)

For value received, I hereby waive presentment, demand, protest and notice of non-payment of within note.

WILLIAM J. DINGEE.

IRVING A. BACHMAN.

THOMAS GRAHAM,

By JOHN L. HOWARD,

His Attorney.”

(These four names, including “By John L. Howard, His Attorney,” are written in ink.)

The WITNESS.—(Continuing.) My recollection is that at the time of the delivery of these stocks and bonds of the Northwestern Portland Cement Company to me I gave Mr. Norcross a receipt for them—the Standard Portland Cement Corporation by myself as secretary. Mr. Norcross delivered me the bonds, and, I think, at different times stocks—they did not all come up at once. On one of these occasions, I think it was on the first occasion, I had a conversation with him to the effect that he wanted a receipt

(Testimony of L. F. Young.)

[524—179f] and that I did not want to give it and my recollection is that he had a receipt prepared and that he stated, as I remember it, that he was giving me more stock than one for one, and he wanted something to show for it. My memory is, anyhow, that I gave him a receipt in the name of the Standard Portland Cement Corporation. I do not remember any such statement by him as that he came up there to make delivery of the stock and bonds in accordance with the letter of May 4, 1908. We were together probably half an hour, and what all the conversation was I do not remember.

Q. But you understood, anyhow, did you not, that he came there in accordance with the letter of May 4th, 1908?

Mr. DUNNE.—We object to that as incompetent, and not proper cross-examination. His understanding is not evidence.

The MASTER.—I will overrule the objection.

Mr. DUNNE.—We note an exception.

A. I understood that we were expecting these bonds and stock and—

Mr. OLNEY.—You can answer that question yes or no; and then make your explanation.

Mr. DUNNE.—We would like to have the witness answer the question.

The MASTER.—Let him have it read to him.

(The question was here read by the reporter.)

A. I will have to explain my answer, if I can.

Mr. DUNNE.—You are entitled to an explanation.

A. (Continuing.) I will say yes, but with this

(Testimony of L. F. Young.)

understanding, that I understood that my delivering these notes—

Mr. OLNEY.—Q. Let me ask you right there—

Mr. DUNNE.—We would like to have the witness explain his answer. Just let him explain his answer.

Mr. OLNEY.—But it is right on the point of his explanation that I want to ask this question; is the understanding that you are now [525—180] to testify to any understanding that you had with Mr. Norcross, or is it one that you had entirely outside of Mr. Norcross?

A. The delivery of these notes and the acceptance of the bonds and stock was in accordance with my understanding, whether it was from Mr. Norcross or not, that it was in fulfillment of the arrangement made between Mr. Dingee and Mr. Howard that this transaction should take this form and should be carried out in the form of a purchase by the Standard; that is what I was going to say. Mr. Norcross came in. He may have brought the letter of May 4th, 1908, with him. I don't think that letter was mailed to us, but I think that letter was handed to me by Mr. Norcross. I put these bonds in the safe deposit box in the Crocker National, in the Crocker safe deposit vaults, the same afternoon—the same day, I should say. I put them in with the treasury bonds, and they have been there ever since, all the bonds—treasury bonds and these bonds are altogether there now, in the safe deposit box. I am the only one who has had access to the safe deposit box all the time, and, accordingly, I only had access to these

(Testimony of L. F. Young.)

bonds, and I have at the present time, and I have had continuously ever since I got them.

The Bellingham Bay and British Columbia Railway Co. stock belonging to the Northwestern Portland Cement Company was pledged for the indebtedness of the Santa Cruz Portland Cement Company and the Atlantic Portland Cement Company on either the 10th or 12th of February, 1908. I signed the pledge as secretary. I believe I was the secretary of the Northwestern Portland Cement Co. at the time. I was not a director, but I was secretary. I cannot say that I was aware of the fact that the stock of the Bellingham Bay and British Columbia Railway Co. was the property of the Northwestern Portland Cement Co. I never had seen it or heard of it until that day. I did not know at that time, nor was I at that time informed, that it was the property of the Northwestern Portland Cement [526—181] Company. I did not suppose that it was the property of the Santa Cruz Portland Cement Co. I supposed it was the property of William J. Dingee. He was putting up other property of his own; it stood in his name as trustee. I was not aware at that time of the fact that this property was the property of the Northwestern Portland Cement Company. I had been secretary of the Northwestern Portland Cement Co. from the middle of May, 1907. I had been secretary then for pretty close to a year. My acquaintance with the transaction of the Northwestern Portland Cement Co. was very general, because nothing, to my knowledge, had ever been done, nor had I done any-

(Testimony of L. F. Young.)

thing, concerning the Northwestern. The Northwestern did not make up monthly trial balances as the other cement companies did, that I am aware of. I never saw any, to my knowledge. If I did, I have no recollection of ever seeing it. I did not look at the books of the Northwestern Portland Cement Company. I seldom looked at the books of any of the companies. That was not within the line of my employment. The line of my employment was principally to borrow money. That was how my time was occupied, from about the time the panic started in November, 1907. My duties in that particular were due to the particular exigency of the occasion. One of the things I was doing was subdividing Dingee Park. I spent about half a day in the office. I did not keep the books and did not have anything to do with the books. I opened the mail in a great many cases for a great deal of the time. I did a great deal of the corresponding. I attended to a lot of Mr. Dingee's personal affairs and signed such things as were necessary. I was not engaged at it very long. I devoted half a day to it for a long time. The first time I ever heard of this Bellingham Bay and British Columbia Railroad stock, or saw it, or knew anything about it, was about the 10th day of February, 1908. I knew that Mr. Dingee was administrator with the will annexed of the Estate of Alvinga Hayward and I knew that the Estate of Alvinga Hayward had [527—182] Bellingham Bay stock. Exactly in whose name it stood, I did not know. I knew that Mr. Dingee handled a great many matters for Mrs.

(Testimony of L. F. Young.)

Rose, and now that I speak of her, and you ask me what I was doing for Mr. Dingee, I remember that I attended to a great many of her matters. I think he attended to the building of the Rose Building. She had some of that stock, and I think he had possession of it. He handed me a certificate for 2,881 shares, standing in his name as trustee, and asked me to have it split up in one certificate for 2,800 shares, and in another for 81, which I did. That was the first time I ever heard of it or ever saw that certificate or ever paid any attention to it. That was absolutely the first time I knew outside of his interest through the Hayward Estate that he was concerned at all with the Bellingham Bay and British Columbia Railway Company.

Q. You are familiar with many of the matters about which you testified, and you were familiar with the facts that the notes of the Standard Portland Cement Corporation had been given in accordance with that resolution reciting the purchasing of stocks and bonds of the Northwestern Portland Cement Corporation, and you were the secretary of the Standard Portland Cement Corporation at the time?

A. Yes, sir.

Q. And, as you testified, these came into your hands as such secretary. How do you explain the fact, which you have testified to here, that under Mr. Dingee's direction, you transferred these stock certificates into your name as secretary, saying that you held them as secretary of the Northwestern. How do you explain that fact?

(Testimony of L. F. Young.)

A. I explain that fact in this way: that Mr. Dingee was very much worried over this transaction, and he had three objects in view; one of them was to get Mr. Evans off his back; the other one was to conciliate Mr. Howard, and the third one was to [528—183] get a years' time to settle this transaction in the way he wanted to settle it. I had absolute confidence in his ability, and it was not shaken until about November, 1908. I considered him one of the biggest financiers here, and I knew he had handled millions of dollars, and I thought that he would always continue to do that, so when he told me that he was going to put it through in this form and that he himself would take it up at a later date, I had absolute confidence that it would be done in the way he said it would, and I obeyed his instructions. It was all I had to do, and, accordingly, as secretary of the Standard Portland Cement Corporation, upon Mr. Dingee's personal assurance merely that he would take up these notes I permitted the stocks to be turned back into the treasury of the Northwestern Company. I have been continuously the secretary of the Standard Portland Cement Corporation.

Q. Have you ever done, or has the Standard Portland Cement Corporation ever done, anything to recover back this stock from the Northwestern Portland Cement Company?

A. They do not consider they own it; they have done nothing to recover them back. I do not know where the check-book of the Northwestern Portland Cement Company is, except, I presume, Mr. Cannon

(Testimony of L. F. Young.)

has it. It is a hard thing to say where the Northwestern banked. Practically all the moneys that came there went into Mr. Dingee's own name and he banked where he saw fit. I did not have anything to do with that. I may have signed isolated checks. In a great many cases he gave his own personal checks for the transactions. I presumed I did sign checks for the Northwestern. I don't remember now. I don't ever remember an occasion for signing one. Mr. Dingee gave up controlling the management of the two cement companies on November 18, 1908. The management was turned over to William H. Crocker—I am referring to the Santa Cruz and the Standard. Mr. Gregg, Mr. Cameron and Mr. Crocker had something to do with it. Mr. Gregg was not a director until very [529—184] recently. The directors were Mr. Morrison, Mr. Greene, Mr. Cameron, Mr. Barry and myself. I believe that Mr. Gregg is associated with Mr. Crocker and was at that time, and interested himself as such associate in the management of these cement corporations, and particularly to the financial side of it, I would say. I remember that Mr. Dingee had sent a statement down to them which, in my judgment, was not correct, and I so informed Mr. McEnerney, who was acting on behalf of Mr. Dingee. He asked me if I could prepare a correct statement, and I told him that I could at least show some corrections that should be made, that there were some outstanding obligations or transactions the fact of which I was not fully informed as to, and they should be brought to the

(Testimony of L. F. Young.)

attention of the people contemplating buying or taking the corporation over, and I got up a new trial balance and put on the end of it an addenda, meaning thereby things that did not appear in the trial balance. There had been the transfer of credits from accounts and there had been some outstanding obligations and power bills, and these notes which I wished to be brought to the attention of Mr. Gregg. I gave a similar copy of that to Mr. James Smith for Mr. Howard. I do not remember that this addenda used exactly the word "purchase," but it showed there \$100,000 liability outstanding on account of these bonds. Mr. Howard still has his statement, and I presume Mr. Gregg still has his. I delivered that to Mr. Gregg at that time. As to the trial balances of the Santa Cruz and the Standard which are in evidence here, I want to make one correction: that in the trial balance of the Santa Cruz Portland Cement Co. there is a figure which would be misleading. It would appear by that statement the American Bridge Co. owed the Santa Cruz Portland Cement Co. \$136,000, while in reality it was the other way. That entry is brought about by the fact that the American Bridge Co. was asking for our notes. The notes were executed and sent, and they were charged with the notes and bills receivable, were credited, but the American [530—185] Bridge Company was never credited with the amount of material that was bought, but was the machinery in the plant account debited, so those items crossed each other. They sent back the notes and took an agreement instead, consequently that

(Testimony of L. F. Young.)

entry was reversed; it was not an asset but a liability. In April and May, 1908, the Standard Portland Cement Corporation was the owner of 211 bonds for \$1,000 each of the Santa Cruz Portland Cement Corporation; it did not own any of the stock to my knowledge. The Santa Cruz did not own any of the stock or bonds of the Standard, to my knowledge, other than this transaction; the Standard Portland Cement Corporation had no interest in any of these stocks or bonds other than the one involved in this suit; the one pending in the Superior Court. Neither the Standard nor the Santa Cruz took any of the bonds of the Northwestern to my knowledge.

This entry, "1907, Jan. 5, check, fifty thousand," in the Bellingham Bay and British Columbia account appearing in the ledger of the Northwestern Portland Cement Co., is in the handwriting of Walter Cole; and the entry below it, "May 21, check thirty-six thousand six hundred and eight dollars," is the same; and April 24, for five thousand dollars is the same. The one on January 24, thirty thousand dollars, is in the handwriting of Mr. Herbert, bookkeeper in the employ of the company. This last entry, "Jan. 24, for thirty thousand dollars," would be either January 24th, 1908, or 1909, but it looks as if it would be 1908; that would be 1908, because Mr. Herbert is still with us and he would not have been in the employ of this company in 1909.

Q. This journal shows that.

Mr. BROBECK.—It shows it is 1908.

Mr. OLNEY.—Yes.

(Testimony of L. F. Young.)

Mr. PRINGLE.—Q. What is the other journal page there; one is page 20, what is the other one?

A. Thirty-eight. [531—186]

Mr. DUNNE.—Q. That is the last item in the account?

A. Yes.

Mr. BROBECK.—Q. What book is that you are testifying from?

A. The ledger of the Northwestern Portland Cement Co. I want to make this statement: In my judgment, I have never seen this page before in my life. I see here it says, “2196 shares.” According to my recollection it was 2,881 shares of the Bellingham Bay, and I do not know whether there were directors’ shares taken out. The only figure I have in mind is 2,881. I never saw that page before in my life and never looked at it until this minute. I am referring to page 303 of the Northwestern Portland Cement Company’s ledger.

Redirect Examination.

The amount involved in these disputed claims between the Western Building Material Company and these cement companies was something like \$17,000 or \$20,000. From the “Complainant’s Exhibit No. 11,” it would appear that there were unsettled claims with the Western Building Material Co. on April 30th, 1908, amounting to \$31,508. I am reading from the trial balance of the Santa Cruz Portland Cement Company. And from the other exhibit of the Standard Portland Cement Company, it would appear that there were \$17,737.61 outstanding as un-

(Testimony of L. F. Young.)

settled claims. The last I heard of Dr. Bachman was from Nazareth, Pennsylvania, and of William J. Dingee was in New York City. The last I heard of Mr. Dingee being here was probably in July, 1909; that is the last recollection I have of his being in the State. I do not think Dr. Bachman has been here since that time.

In speaking of my dealings with Mr. Norcross, I spoke of a receipt that was asked for by Mr. Norcross, and I did not agree to give the receipt. I meant by that *the it* was in fulfillment of arrangements made between Mr. Dingee and Mr. Howard. I meant specifically that they had agreed that Mr. Dingee had [532—187] originally intended to give his personal note, but that they did not want to take his personal notes and that the transactions were agreed to go through in the form of a sale direct to the Standard, and the Standard was to give the notes and Mr. Dingee and Dr. Bachman indorsed them. I did not want to give that receipt, because I considered that we were exchanging even, he was getting notes and I was getting bonds and stock, and it did not require anything else to memorialize that transaction. With reference to the depressed financial condition affecting these cement companies after November, 1907, the condition of the cement companies got continuously worse, and, as Mr. Howard says, the cement was giving us a great deal of trouble as well as the creditors,—all of which culminated in the transaction of Nov. 18, 1908, by which Mr. Dingee ceased to be in control. We could not sell the cement and consequently we ran

(Testimony of L. F. Young.)

out of funds entirely by that time. The Standard Cement was better than the Santa Cruz; for instance, you take it in Oakland, as Mr. Howard well knows, I think that during a certain period there you would not find a barrel of Santa Cruz cement in the whole county of Alameda, and yet they were using Standard there, but there was some difficulty even with the Standard; all of which, however, has been changed. They changed the form of manufacture as well as they changed the raw side of the mill; that was a little after the middle of the year 1908. As to an effort being made by Mr. Howard to secure the control of the Standard Portland Cement Corporation, I remember a conversation I had with Mr. Howard once in his office. He told me that he could take the Standard Portland Cement Corporation over himself and make a paying institution of it; that the material was not looked after, and it was not properly managed. I should say that was several months before the final change of management. When Mr. Dingee got into these difficulties, I don't know to whom [533—188] he turned first for financial assistance, but among the people that he particularly looked to help him out was Mr. John L. Howard.

I testified that I had more than one interview with Mr. Norcross relative to the delivery of the stocks and bonds of the Northwestern Portland Cement Company. In accordance with the letter of May 4, 1908, Mr. Norcross brought to me 87 or 90 bonds of the Northwestern Portland Cement Company together with the stock certificates accompanying the

(Testimony of L. F. Young.)

same, one by one, and delivered those to me, at one interview, and subsequently at another interview or perhaps more than one interview, brought me what we may call the promotion stock that had been issued to Mr. Howard. He might have split up the bonds, but I don't think he did, but I know there was more than one meeting about the stock. He brought up different stocks at different times. I ceased to be secretary of the Northwestern in the latter part of the year 1908, or the first of 1909. I ceased to be secretary first, and then later as a director. I went out as a director on May 3, 1909.

Mr. BROBECK.—In the first place, the whole book is offered for the purpose of showing that there never was passed any resolution by the Board of Directors of the Northwestern Portland Cement Company authorizing Mr. Dingee or anyone else, to make any pledge or disposition of the stock of the Bellingham Bay and British Columbia Railway Company. Is that admitted?

Mr. OLNEY.—You have been through it, Mr. Brobeck and ascertained that to be the fact?

Mr. BROBECK.—Yes.

Mr. OLNEY.—That is admitted.

Mr. BROBECK.—We would like the further admission that the original incorporators of the company, namely, W. C. Webb, Edwin Schwab, H. M. Sims, R. M. Moore and A. F. Morrison, were all either [534—189] members of the firm or employees of the firm of Morrison, Cope & Brobeck, at the time of the incorporation of the Northwestern

Portland Cement Company.

Mr. PRINGLE.—Is that true, Mr. Brobeck?

Mr. BROBECK.—That is also true.

Mr. OLNEY.—That is admitted.

Mr. BROBECK.—We would also like the admission that at the time of the incorporation of the Northwestern Portland Cement Company, the firm of Morrison, Cope & Brobeck was employed by William J. Dingee and Irving A. Bachman, for the purpose of having that corporation incorporated.

Mr. OLNEY.—That is admitted.

Mr. BROBECK.—We also offer the following portion of the Minutes of the meeting of the Board of Directors of the Northwestern Portland Cement Company, held on the 30th day of August, 1906, appearing on pages 10 and 11, of the minute-book of that corporation, and reading as follows:

“Mr. Morrison then stated to the Board that as the Company proposed to carry on business in the State of Washington, it would be necessary to file with the Secretary of State of the State of Washington a certified copy of the Articles of Incorporation of the Company. He stated that he had some business with the firm of Kerr & McCord of Seattle and he thought it would be well to authorize them to attend to the matter.

Thereupon on motion of Mr. Morrison, seconded by Mr. Schwab, the Secretary was ordered to procure a certified copy of the Articles of Incorporation of the Company to be filed in the office of the Secretary of State of the State of Washington. It was also suggested that company would have to appoint

an agent resident in the State of Washington upon whom the service of legal process could be made, in order to comply with the laws of that state in that respect. It was suggested, however, that the matter of appointing an agent should be deferred until later when Mr. Morrison was authorized to investigate and suggest the name of some suitable person who would act in the premises."

Mr. BROBECK.—I offer also that portion of the minutes of the directors' meeting of the Northwestern Portland Cement Company held [535—189a] on the 26th day of September, 1906, which reads as follows:

"The President then called attention to the matter of appointing an agent residing in the State of Washington. Mr. Morrison said that he had consulted Mr. John L. Howard, who had extensive interests in Washington, and he had recommended the appointment of Clinton W. Howard, an attorney at law residing in Bellingham, County of Whatcom, State of Washington, as the resident agent of the company.

Thereupon, on motion of Mr. Morrison, seconded by Mr. Sims, it was

RESOLVED: That this corporation Northwestern Portland Cement Company, does hereby appoint Clinton L. Howard, of Bellingham, County of Whatcom, State of Washington, as the agent of this corporation, residing in the State of Washington, upon whom all process of law against the corporation may be served in that state, and the President and Secretary are hereby authorized, empowered, and directed on behalf of the corporation, and under the corporate

name and seal of the corporation, to make, execute, acknowledge and deliver to said Clinton W. Howard, a power of attorney in form sufficient to comply with the laws of the State of Washington, appointing him as the agent and attorney of this corporation, residing in the State of Washington, upon whom service of all process of law may be made, and with power to receive and accept such service of process; and that they cause said appointment and power of attorney to be filed in the office of the Secretary of State of the State of Washington.”

Mr. BROBECK.—I also offer the following portion of the minutes of the same meeting:

“The President stated that the object of the meeting was to consider and act upon a proposition received from Dr. Irving A. Bachman to sell to this Company certain lands in the County of Whatcom, State of Washington; and he laid before the meeting a written proposition from Dr. Bachman of which the following is a copy:

‘San Francisco, Cal., Sept. 11th, 1906.

Northwestern Portland Cement Company,

Gentlemen: I am the owner of the following described lands situated in the County of Whatcom, State of Washington, viz.:

The Southeast quarter (SE. $\frac{1}{4}$), the South half of the northeast quarter (S. $\frac{1}{2}$ of NE. $\frac{1}{4}$) and the Northwest quarter of the Northeast quarter (NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$) of Section Twenty-seven (27).

All in Township No. Forty (40) North of Range No. 5 East, Willamette Base and Meridian.

This land contains immense deposits of material

suitable for the manufacture of Portland Cement, both economically *and* a very extensive scale.

I offer to sell and convey the same to your company in [536—189b] consideration of forty-nine thousand nine hundred and ninety-five (49,995) shares, fully paid up, of the capital stock of your corporation.

This offer will remain open until withdrawn by me.'

RESOLVED that the offer of Doctor Irving A. Bachman to convey to this corporation the lands in Whatcom County, State of Washington, described in his written offer dated September 11, 1906, and this day read to this meeting, in consideration of forty-nine thousand nine hundred and ninety-five (49,995) shares, fully paid up of the capital stock of this corporation, be and the same hereby is accepted; and that the president and secretary of said corporation be and they hereby are authorized and empowered and directed to issue to said Irving A. Bachman, on behalf of the corporation, said forty-nine thousand nine hundred and ninety-five (49,995) shares of stock fully paid up, upon delivery to this corporation of a good and sufficient deed executed by said Irving A. Bachman and wife, conveying said property to this corporation, and

FURTHER RESOLVED: That said President and Secretary be and they hereby are authorized to do and perform on behalf of the corporation, all such other acts and deeds as may be convenient and proper to consummate said transaction."

Mr. OLNEY.—We have no objection to the introduction of that providing that it is admitted that all

of the directors of the Northwestern Portland Cement Company were present at that meeting and that those directors were W. C. Webb, R. M. Sims, A. F. Morrison, Edwin Schwab and R. M. Moore.

The MASTER.—I suppose that is admitted, is it not, Mr. Brobeck?

Mr. BROBECK.—Yes. The minutes so recite and I presume that that is true.

We also offer that portion of the minutes of the meeting of the Board of Directors of the Northwestern Portland Cement Company, held October 25, 1906, reading as follows:

“The President stated that pursuant to the action taken by the Board at its last meeting, the company had received a deed from Irving A. Bachman and wife, conveying to the company, the land in the County of Whatcom, State of Washington, described in Dr. Bachman’s written offer of September 11, 1906; that the deed had been recorded in the office of the County Recorder of the County of Whatcom, State of Washington, and that the stock which was the consideration for the deed had been issued to Dr. Bachman.

The President also reported that pursuant to instructions of the Board, a power of attorney had been executed in favor of Clinton W. Howard, appointing him as the resident agent of the company in the State of Washington, upon whom process of law against the corporation [537—189c] in that state might be served and that this power of attorney had been filed with the Secretary of State of the State of Washington.”

Any objection to that?

Mr. OLNEY.—Who were the directors present?

Mr. BROBECK.—The minutes recite that all of the directors were present.

Mr. OLNEY.—And the directors were the same?

Mr. BROBECK.—The directors were the same, that being the meeting at which Frank A. Losh was elected to fill the vacancy caused by the resignation of Director Moore. Director William J. Dingee was elected to fill the vacancy caused by the resignation of Director Sims.

Mr. OLNEY.—Were those resignations before or after that transaction you just read?

Mr. BROBECK.—These resignations appear to be subsequent to the statement made by the President. Director McGary was elected to fill the vacancy caused by the resignation of Director Schwab.

Mr. OLNEY.—If it is admitted that all of the directors were present at the time of this report by the President to the Board of Directors, and that those directors were the same as those previously enumerated, there will be no objection to the evidence.

The MASTER.—Let me ask at this point: What is the effect of that summary annexed to the Wenzelburger Report, which is attached to the deposition of Mr. Evans, if the facts stated in that are not admitted, and you are proving them otherwise?

Mr. OLNEY.—They are all correct. There is no question about it whatever.

The MASTER.—Yes, but are they accepted as proof of the fact?

Mr. BROBECK.—That is simply the statement of certain things made by Wenzelburger, the agent of Evans, and which, of course, were [538—189d] within the knowledge of Evans at the time. That was put in for the purpose of bringing the attention of Evans to the facts stated in that report.

The MASTER.—You are reading now the change in the directorate. You have that in the record.

Mr. BROBECK.—I just did that because Mr. Olney suggested that he wanted to know who were acting as directors at that time. That report by Mr. Wenzelburger showed the deraignment of title, as it were, the different directors as they came in and went out.

The MASTER.—Yes, I understand that.

Mr. OLNEY.—As I understand it, the admission is made in connection with the introduction of this testimony—the admission which I asked for?

Mr. BROBECK.—To what effect, Mr. Olney, that the directors were all present?

Mr. OLNEY.—At the time that this report was made by the President to the Board of Directors of the Northwestern Portland Cement Company all the directors were present, and that the directors were the same as those previously enumerated.

Mr. BROBECK.—That is admitted, that being the meeting at which the change in the directorate occurred.

Mr. OLNEY.—But subsequently to the Report.

Mr. BROBECK.—At the same meeting, but the change in the directorate appearing subsequently in the minutes. (Addressing Mr. Dunne.) Mr. Dunne,

I believe the certification of the creation of the indebtedness of the Northwestern Portland Cement Company has already been admitted in evidence?

Mr. DUNNE.—Yes, that was introduced and admitted the other day.

Mr. OLNEY.—In that connection, Mr. Brobeck, I have assumed that it is admitted that the bond mortgage of the Northwestern [539—189e] Portland Cement Company covered all of the property of that company, both real and personal, and both the property which it held at the time and property subsequently acquired.

Mr. BROBECK.—Well, I don't know personally as to that. If it were properly drawn it unquestionably does. It will speak for itself. It is in evidence.

Mr. OLNEY.—You mean the bond mortgage—the deed of trust?

Mr. BROBECK.—Oh, no. The certificate of the creation of the indebtedness.

Mr. DUNNE.—My recollection is that it shows that fact.

Mr. BROBECK.—We might look at that.

Mr. OLNEY.—Can we have that point settled now?

Mr. DUNNE.—Not now, because we have not the papers here. We can get them at noon.

Mr. OLNEY.—(After consultation with counsel.) It is admitted, if the Court please, that the following language was in the deed of trust securing the bonds of the Northwestern Portland Cement Company:

“Also all other property, both real and personal, and all rights, wherever situated, and all franchises

(Testimony of W. H. Cole.)

now owned by the company and all which it may hereafter acquire.”

Mr. BROBECK.—I will admit it. I think that is about all I want to offer at the present time. It may be that on further redirect examination of Mr. Young, something further will develop.

[Testimony of W. H. Cole, for Complainant.]

W. H. COLE was then called as a witness on behalf of complainant, and after having been first duly sworn, testified as follows, to wit:

Direct Examination.

I am a salesman with Britton and Rey, the lithographers, [540—189f] here in San Francisco. I was connected with the cement corporations of which we have been speaking in this case. I was assistant secretary of all of them, with my office in the Crocker Building in San Francisco. It is my impression now that I became assistant secretary of these corporations in 1907 but I am not positive. I ceased to be connected with these corporations in November, 1908—all excepting the Northwestern. I recollect the fact that during the year 1908, a gentleman named Wenzelburger came to the office to make an inspection of the books. I don't recall what part of 1908 that was, but it was the early part of the year. After Mr. Wenzelburger had concluded his work there I recollect an incident in which Mr. Foster Young exhibited a letter to me. At the time of the exhibition of that letter, I was in Mr. Young's office. I could

(Testimony of W. H. Cole.)

identify the substance of the letter if it were exhibited to me.

Mr. OLNEY.—I suggest that you ask him what the substance of the letter is first, without showing him the letter.

Mr. DUNNE.—Yes, I will do that.

Q. From unassisted memory, Mr. Cole, I wish you would relate all that you recollect now of the substance of that letter.

A. All I remember in general is that it was a letter from Evans, Coleman & Evans, in which he stated that he believed Mr. Dingee and Mr. Bachman had been using the funds of the corporation for their own benefit and that they were criminally liable, that is all I recollect. I do not recollect to whom it was addressed; that part of the letter I am satisfied I did not look at. The letter which you exhibited to me dated 4th of March, 1908, on the beginning of page 50, line 24, of Mr. Howard's deposition and ending on line 24 of page 51 thereof, appears to me to be the letter. This first paragraph of the letter is all I ever read through; the other portion I paid no attention to. [541—190] The note purporting to be signed by Stanford Portland Cement Corporation to the order of Thomas Graham, and marked in this proceeding as Defendants' Exhibit "F," and a similar note to Stockett, Trustee, marked in this proceeding exhibit "E," and a similar note to Rand, marked exhibit "D," and a similar note to Evans, Coleman & Evans, marked in this proceeding exhibit "C," were never listed as obligations of the Standard Portland

(Testimony of W. H. Cole.)

Cement Corporation, nor were any of the bonds or stocks of the Northwestern Portland Cement Company ever listed as assets on the books of the Standard Portland Cement Corporation.

The following correspondence and documents were then and there received and read in evidence in the above-entitled action, and are in words and figures as follows, to wit:

“Bellingham, Wash., 25th Feby., 1906.

Dr. I. A. Bachman,

Dear Sir: I rec'd Mr. Dingee's Grasshopper telegram—reached Vancouver at noon, made an appointment to meet the Stave Lake Power People at 3 and meantime the Secty had prepared the enclosed letter. Afterwards he came with me on the 4 P. M. train en route to Montreal where he is to meet their consulting hydraulic engineer. They are at work on their first dam and are now putting out tenders for turbines and generators intending to *instal* at once 3 units of 5,000 K/W each. The local engineer in charge said that counting delay from flood waters it would require until June, 1908, to get the necessary hydraulic work completed. Meantime he thinks that the Electrical Engrs. may finish their part.

The letter indicates nothing but an intimation of the rate 25. & owing to the general indefiniteness I did not think it worth while now to discuss this. It is about $\frac{2}{3}$ of what you are paying at Napa but these men cannot be at all positive as to time & this is the misfortune.

I tho't it best to let the matter rest until I saw you as there will be nothing lost and in view of the delay you may conclude on steam.

I shall go to Kendall in the morning & spend 2 days with Supt. Paige on RR. matters, expecting to reach home on Saty. P. M. or Sunday and will be ready to meet you at yr. convenience in the early part of the week.

Yours truly,
JOHN L. HOWARD."

Mr. DUNNE.—I offer in evidence the letter dated June 26, 1906, from John L. Howard to William J. Dingee. I call attention to the [542—191] fact that there is no signature at the end of the letter.

Mr. OLNEY.—There is no objection made on the ground of the unauthenticity of the letter.

Thereupon said letter was received and read in evidence in the above-entitled cause, and is in words and figures as follows, to wit:

"June 26. 1906.

Wm. J. *Dinge*, Esq.,

Post and Franklin Street,
San Francisco, Cal.

Dear Sir: I left here on Friday last, spent Saturday & Sunday on the line of the B. B. & B. C. R. R. in the lime district, returned to Vancouver on Sunday night. Shipped samples of lime and Silicate rock to the factory and wired you that I was ready for the Doctor who starts North tonight.

On Saturday last, we had the use of R. R. Co.'s motor car from Sumas Eastward, and as on account

of scarcity of trains and bad roads we found it convenient and time saving. I asked that if agreeable to you, you could arrange through Taylor to place it at my disposal on Saturday next, if so to wire me. I do not want to go in from Bellingham, but want to come out that way.

I enclose blue-print copied from one given me by B. G. & Co. man who located and bought all the properties for them.

Just imagine a country where the Railroad passes at this point through a *falt* valley about one mile wide and where the mountains rise steep on either side.

The map shows hatched in red the 40 acre pieces purchased by B. G. & Co. on both sides of the R. R.

On the West side at one point the ledge comes down the Mountain to and below the Valley floor. They have bared it of timber, run in a tunnel of 107 ft. and it is practically ready for a quarry opening with a factory site and a water supply immediately in front on the valley level.

In so far as I could learn there is no other lime stone in the Mountains on that side of the valley.

On the east side of the R. R. they have bought some flat valley land and a lime deposit in the Mountain immediately behind it. In all they own 1330 acres.

I did not see the limestone exposed on their property on the east side, but on Saturday went up the Valley and climbed the steep mountain side to reach the base of an exposed Cliff more than 100 ft. high and brought away samples.

On Sunday I climbed the Mountain immediately

in the rear of the farm house where I stopped, but at the end of the trial which was nearly 45 degrees steep I balked, bellows gave out and I send the guide aloft to bring the samples.

You will notice that I visited two properties immediately adjoining B. G. & Co's purchase on the East side. These may be *acquire*. I have no doubt that it is the same ledge that runs thro them all and it is all equally good for cement purposes, but it may require the Examination by a Civil Engineer to determine whether a quarry [543—191a] face may be made for enough down on the mountain side to make it available. I think it likely that such a face may be developed and if so, either one of the two locations I visited will yield material for generations—but I have marked the pieces.

A:—Where I saw the immense Cliff Exposed at the top of the mountain.

B:—Where I did not have the strength to go to reach the exposed face.

C:—Pieces where the ledge through the Mt. would be found.

D:—Flat valley land for factory site near water—a present farm.

E:—Intervening pieces not *take* up and upon which I directed notices in my interest to be posted.

The small square blocks represent 40 acres.

I had with me Mr. Evans, Balfour G. & Co.'s former partner in the property and a German 'Reidle' who located and purchased all the properties they now own.

He has been at the work 7 years and has become

tired of their inactivity.

I felt that I had done all that was possible to get ready for the Dr. and as time is the essence wired for him to come and put his Eagle Eye on the display.

I have read and now return his report on conditions at Santa Cruz. It is so inflammable that it might have spontaneously ignited.

I hope you haven't hung up that payment of \$10,000 due us from Healy & Tibbets, if so your 'valuable asset' will stay in the North until he gets enough to go home and whale your entire outfit.

I am sincerely sorry to note from Dr.'s Letter that you were having a recurrence of headaches which I trust have long since passed away.

Yours very truly,"

The next is a letter from John L. Howard to Dr. Bachman, dated the 2d of July, 1906.

Thereupon said letter was received and read in evidence in the above-entitled action, and is in words and figures as follows, to wit:

"Bellingham, Wash., 2nd July, 1906.

Dear Sir: I have had a preliminary canter with Mr. Piage of R. R. Co. Taylor permits him to be only a Clerk in any matter outside of small routine & we must put the gloves on with Taylor after my return.

Paige indicates viz.:

On Mchy. from Bellingham \$10 per car—from the East he said the Transcontinental line would absorb the local from Sumas to Factory. On coal he 'thought' it should be 50¢ & when he said that I was

in danger of an attack of heart failure he mentioned 40¢ and said that even this might be revised. I pressed him to waive the 15¢ charge for wharfage and he consented. We agreeing to provide a storage bunker on a wharf space to be furnished by them.
[544—191b]

On cement he named 50¢ to Bellingham for local use or export no wharfage charge & 7.50 per car which equals 25¢ from factory to Sumas—when I asked if the connecting road having the long haul of coal would not absorb his local he thought they might do so.

The trouble is that he has no authority to decide any big proposition and I pressed him as far as I could to get his bottom ideas & the final squeeze must be put on Taylor.

I am to see him again on Friday evg.

Van Nalkenburg, the Sumas Realty Agt., reported to Riedle's man that the Cliff claims on wh. he held the option have been sold. Our Old Reliable German doesn't believe it & says 'I git him.' I expect more news on Friday and if anything of interest will write.

Yours truly,
JOHN L. HOWARD."

Mr. DUNNE.—I will next offer a letter from John L. Howard, to Dr. Bachman, dated Vancouver, July 3, 1906. It is an autograph letter written upon the letter-head of Evans, Coleman & Evans.

Thereupon said letter was received and read in evidence in the above-entitled cause, and is in words and figures as follows, to wit:

“Vancouver, B. C. July 3, 1906.

Dear Sir: I arr'd here late last night and trust that you made connections in and out of Portland that will put you in S. F. tomorrow A. M.

Mr. Evans showed me the reply that Burns of (B. G. & Co.) Portland made to the letter Evans wrote him.

Burns thinks I am bluffing and asks ‘where are all these properties that Howard talks about and that we have not been able to discover during all these years.’ He said that his S. F. People would see me on my return home provided I was not too long about it as he had promised Moore an answer next (this) week.

I mean to get an option of some kind from that power concern for 60 days even if the rate and conditions should have to be made the subject of subsequent negotiations. Having that we will have absorbed the producing capacity of their present & proposed plant and our factory could be running long before B. G. & Co., could possibly arrange for power and this I think would completely block the game if nothing else did.

At the end of 7 years they will wake up to find that they have left out other properties which will destroy the importance of their holdings and they mean to convey the impression that failing with me they will let Aman Moore have a chance to handle their property and they will probably join him in the scheme.

We must ‘do’ them first & quickly.

Yours truly,

JOHN L. HOWARD.

I should have said in my letter of yesterday that the B. Bay & B. C. [545—191c] R. R. pay \$3 per ton 2240 lbs. for its coal fuel delv. at Sumas which means \$2 fob cars at mines near Tacoma and \$1 frt. I presume it to be run of mine coal & if so it is not a clean article.”

Mr. DUNNE.—I next offer a letter from John L. Howard to Mr. I. A. Bachman, Napa Junction, dated Jul. 4, 1906, and will read the following portion of this letter.

Thereupon the following portion of said letter was received and read in evidence in the above-entitled action, and is in words and figures as follows, to wit:

“I left Vancouver yesterday at noon, intending to return to Bellingham on Friday and be at the Hotel Butler on Saturday to see the power people as appointed and get here again by Sunday Noon. Am just in receipt of a wire from Evans.

‘Reidle advises parties offer claims for \$12,000—10 per cent down balance in exchange for transfers. He has sent three men to restake and commends assessment work’—

This looks as tho’ some combination assuming a great anxiety on our part, was trying to work up the price from \$7400. The matter will hold until I get there on Friday. If I feel that it is a bluff, I’ll call them by refusing and offering a lower sum in cash for a quick reply. I fully appreciate the value of this piece as a menace and will get it in some way so as to end the agony.

I am expecting a wire from you to-day after you see Mr. Dingee.

Yours very truly,

JOHN L. HOWARD."

Thereupon the following letters were received and read in evidence in the above-entitled action and are in the words and figures as follows, to wit:

Mr. DUNNE.—I next offer a letter from John L. Howard to Dr. I. M. Bachman, an autograph letter dated July 5, 1906 (reading:)

"July 5, 1906.

Dr. I. M. Bachman,

Dear Sir:—While awaiting your wire due Nanaimo yesterday I gave Reidle general instructions at Bellingham on Monday. Spent yesterday at Nanaimo and today at this place to get some business out of the way. I leave at 10 o'clock midnight to meet Evans at Vancouver and have arranged for Reidle to ride to Bellingham with me and report on his work. Some kind of a combination has been set up against us on the last claims that you visited. Parties want \$12000 10% down balance 30 days or they will extend the option 60 days to that Sumas party who now holds it. I wired Evans not to lose the property but not to be bluffed. Reidle knowing that only \$250 of assessment work was done instead of \$900 due under the [546—192] law sent men to re-stake the claims in order to bring the parties into a tractable frame of mind. I will do what is wise and necessary to close the matters quickly and safely.

I assume that you did not see the power people in Seattle so that I will keep the appointment and call

(Testimony of John L. Howard.)

there on Saty. to get their proposal and wire you, will then pick up Mrs. Howard and am prepared to camp at Bellingham and vicinity until I write you that the property deals are completed.

Visited Victoria Cement plant this P. M. 2 kilns, 60 ft. running. Installing a third. Claim to be making nearly 600 bbls. per day now. Consumption of coal as nearly as they can determine is 100 lbs. per bbl. I am sending you 2 samples of this coal and they mix the two grades half and half. I hope that you saw 'his nibs' before he started for N. Y.

Yours truly,

JOHN L. HOWARD."

Mr. OLNEY.—Is there any objection to my asking one or two questions of Mr. Howard in regard to that letter right now?

Mr. DUNNE.—Right now—no.

Mr. BROBECK.—And I wish you would ask him who "his nibs" is.

Mr. DUNNE.—Yes, we would like to have that brought out.

Mr. OLNEY.—All right, I will ask him.

**[Testimony of John L. Howard, for Complainant
(Recalled—Cross-examination).]**

JOHN L. HOWARD, cross-examination resumed:

Mr. OLNEY.—Q. Who is "his nibs"?

A. That refers to Dingee.

Q. I call your attention to this language: "Some kind of a combination has been set up against us on

(Testimony of John L. Howard.)

the last claims that you visited. Parties want \$12000, 10% down balance 30 days or they will extend the option 60 days to that Sumas party who now hold it." I will ask you if that has any reference to the locations which were made in your name under the Timber & Stone Act? A. No.

Mr. DUNNE.—Q. That is, the 80 acres?

A. No. This property was not taken up.

Mr. BROBECK.—Q. But that was property which you contemplated making some use of in this enterprise at the time, was it not?

A. Dr. Bachman went to look at it and it was thought well to take [547—192a] it in if it could be had even though it were not used. It was not taken.

Mr. DUNNE.—The next is a letter from John L. Howard to Dr. Bachman, an autograph letter, dated the 8th of July, 1906, from Seattle, Washington, and reads as follows:

“Seattle, Wash. 8th july, 1906.

Dr. I. M. Bachman:

Dear Sir: I have at last seen Galbraith Bacon & Co. and the only value their investigation as in so far as I am concerned is that it enabled me to truthfully tell B. G. & Co. in S. F. that we had men in the field here looking for lime deposits.

One Dr. Gould, formerly with the Ideal Cement people & connected with Aman Moore, at one time, has been in the employ of Galbraith ~~this~~ B. & Co. since March at \$125 per mo. and expenses. They told me of this Apl. 1st when I asked them to look

about for me but he was looking both for gypsum which they want to make plaster and incidentally for lime rock. If he had found the latter I think they would put the matter before me but it appears that he has not been cruising much in Washington and in so far as he seems not to have found anything of value so we may dismiss that lead and chiefly because we do not now need it. They tell me that B. G. & Co. are keeping watch of my movements.

Weather still very warm and I wish Santa Cruz was going now to stop the import of eastern cement especially at inland points.

JOHN L. HOWARD."

"In order to avoid giving publicity to my purchases I have concluded to have Riedle & Zender sign deeds and deposit them with the money in a Bellingham Bank until the expiration of the option, time which will be at the end of the month. The deeds may then go of record and meantime you may go on with yr. incorporation as soon as I wire you tomorrow that deeds have been signed. We need 40 acres from Mansard which adjoins Zender's land. Mansard will not sell a part of his 160 and so I may take a bond on the whole until you have time to see whether you want it in connection with factory site, or dwellings for work people.

Yours truly,

JOHN L. HOWARD."

We next offer a letter from Mr. John L. Howard, to Dr. Bachman—probably two letters, written at the same time—

Mr. OLNEY.—Wait a moment Mr. Dunne. They speak for themselves. They show that they are two *two* letters.

Mr. DUNNE.—All right.

The first letter reads as follows: [548—192b]

“Bellingham, 9th July, 1906.

Dr. I. M. Bachman, Napa, Cala.

Dear Sir: I enclose copy of an escrow agreement for the Zender land and have given A. J. Craven our lawyer an order to get the Deed from the Bank and to file it with Riedle's deed, which he holds, on June 30th, after which he will ship the papers, abstracts, &c. to me at San Francisco. This telegraph office leaks and I will wire you from Vancouver tomorrow that these two deals are consumated.

Look now at your Small blue map, 3 brothers Anderson by name, own

160 acres Sec. 15 SW. $\frac{1}{4}$.

40 “ “ 16 SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$.

200 “ “ 22 NW. $\frac{1}{4}$ & NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$.

80 “ “ 21 E. $\frac{1}{2}$ of NE. $\frac{1}{4}$.

One Mansard owns

120 acres Sec. 22 W. $\frac{1}{2}$ & SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$.

40 NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$.

The last item we seem to need because it lies between Zender's land and my 80 acres but Mansard declines to sell part and I have asked Horst the broker to try for an option on the entire Anderson & Mansard holdings for 30 days to give you time to determine whether you will want any or all of them.

If you check off these pieces you will see that the

pieces entirely cut off B G & Co's eastern deposit from the R. R. but they are not useful merely for that purpose.

As to the ledge you last saw I have told a young S. F. lawyer who may locate here that I would give him \$2,000 for the three big claims if he got himself in position to offer them free from adverse contention. If we get these the other claims will be cheap.

In order to make a show & to do useful work, I have told Riedle to take out an Engineer clearly mark out the Section lines thro the brush and timber, determine the best trail line from Zenders to the lowest part of the ledge on Riedle's land and let a contract to make the trail—which done he will go home and await any further orders we may have to give.

I go Vancouver tonight. Nanaimo tomorrow, but do not know exactly how long I will remain there.

Yours truly,

JOHN L. HOWARD."

"Bellingham, July 9, 1906.

Mr. Page, Supt. of B. B. & B. C. R. R. told me that his road gets out of the Transcontinental rate from all connecting line $6\frac{1}{4}¢$ per 100 lbs. to points on his road between Bellingham & Sumas that have been made terminals.

He prefers to work with C. P. R. and consignments intended for Kendal if shipped via C. P. R. should be consigned to Bellingham via Sumas. If routed via Great Northern then they should be made to Sumas via Bellingham. [549—192c]

For the 6 $\frac{1}{4}$ ¢ allowance made to him by the Transcontinental lines he would deliver at Kendall on the through rate.

He had written very fully to Presdt Taylor and thinks there will be no trouble in getting a coal rate of 1¢ per ton (2240 lbs) from Bellingham to Kendall.

Said that the road has a bonded debt of \$150,000 but it is not sure and that the need of raising money for expenses and developements has made Taylor so touchy that he has been very anxious to dispose of the property which is now earning operating expenses and interest:

Averages about 15 cars logs per day East of Kendall and gets \$9 per car minimum. Delivered last month to N. P. at Sumas 88 cars & to Grt. Northern at Bellingham over 200 cars.

Will furnish us a wharf at Bellingham for coal-bunkers to be erected by us, but would expect us to load the cars.

Without a contract he pays the Carbon Hill Coal Co. \$2. per ton f.o.b. at mines & N. P. R. R. \$1. frt for locomotive fuel of which he uses 500/600 tons per mo.

That N. P. R. R. could build from Deming to Kendall but that Levy of N. P. R. R. told Donovan if the B. B. & B. C. R. R. would, not charge more than \$10 per car Kendall to Sumas the N. P. R. R. would not be justified in building.

Has 8 loco. & 59 box-cars—1 Passgr. & 2 frt. engines in good condition balance not good—Track laid with 50–55 & 60 lb. rails—and not in good order

especially the wharf approaches.”

The next is a letter from John L. Howard to Dr. I. A. Bachman, dated San Francisco, August 7, 1906, which reads as follows:

“WESTERN FUEL COMPANY.

San Francisco, August 7, 1906.

Dr. I. A. Bachman,
Napa Junction,
California.

Dear Sir: In some unaccountable way I gave your name as Irving M. Bachman to the lawyer who made out the Riedle and Zender deeds. I discovered this since my return and am now advised that the proper corrections have been made to Irving A. Bachman.

ELECTRIC POWER: You may remember my stating to you an interview with Mr. Hendry of Vancouver, who is to install a large power plant in British Columbia, just north of Sumas.

I ascertained and sent him word that there was no U. S. Customs duty on Electric Power sent over the American border. Mr. Evans is following up this matter for us, and writes me under date of August 2—

(Mr. Hendry is still away and will not be in active business for two or three weeks. I called on his Assistant today who informs me that the Consulting Engineer, Mr. Kennedy, has gone east to look for an Engineer to take charge of the whole work, [550—192d] which is *to ahead* right away, and they expect to have the dam ready early in the coming year. Mr.

(Testimony of John L. Howard.)

Hendry is very anxious to take care of our requirements, but he cannot give us any definite reply for some weeks)

This is worth following up, and if you want to talk it over with Mr. Evans doubtless he can arrange to meet you at Bellingham.

Evans has drawn on me for \$3900, balance purchase price of Watson land. Mansard on the Map.

Yours very truly,

JOHN L. HOWARD."

Q. I would like to ask you at this point, Mr. Howard, the Evans who is referred to in this letter is Mr. Ernest E. Evans, is it not?

Mr. HOWARD.—Yes, Mr. Ernest Evans.

Mr. DUNNE.—The next is a letter from John L. Howard to Dr. I. A. Bachman, dated August 23, 1906, and two copies of letters attached:

“WESTERN FUEL COMPANY.

San Francisco, August 23, 1906.

Dr. I. A. Bachman,
Napa Junction,
California.

Dear Sir: Herewith copy of a letter from B. G. & Co. and my reply. I am afraid that old Riedle has put me in a false position and did not exactly tell me the truth.

At any rate let Mr. Roseberry when he goes, take the train from Bellingham to Kendall, and then get hold of Peter Zender, who will be able to show him

anything that he wishes to know.

Yours truly,

J. L. H.

JOHN L. HOWARD.

Copy.

San Francisco, 23rd August 1906.

John L. Howard, Esq.,

Western Fuel Company,

City.

Dear Sir: Our Portland friends advise us that Mr. Riedle has received a letter from you instructing him to proceed to Bellingham on Saturday to meet a certain Mr. Roseberry.

As Mr. Riedle is an employee of ours, we think it would be more regular if all arrangements for the employ of his services were made by you direct with this firm. [551—192e]

On hearing from you we shall be glad on any future occasion, as we did on recent occasion, to place the services of any of our employees at your disposal.

Yours faithfully,

BALFOUR, GUTHRIE & CO.

August 23, '6.

Messrs. Balfour, Guthrie & Co.,

#416 Jackson Street,

City.

Dear Sir: Your note of date greatly surprises me, for when I first met Mr. Riedle I carefully enquired and learned that he was *quite* free from any employment, and because of that I made use of his proffered services.

Had I known that the conditions were such as your letter indicates I should not have used him un-

der any circumstances, and much less would I have sent him the recent telegram.

J. L. H.

Yours truly,"

We next offer a letter from John L. Howard to W. J. Dingee, of date August 23, 1906, reading as follows:

“WESTERN FUEL COMPANY.

San Francisco, August 23, 1906.

W. J. Dingee, Esq.,

Post & Franklin Streets,

San Francisco, California.

Dear Sir: I will be absent tomorrow, but if you have retained that *that* statement of account from Evans, Coleman & Evans, will you please send it to me. I want to examine some of the items on the accompanying bills.

I enclose copy of letter from B. G. & Company, and of my reply.

I want to see what we paid Riedle through Evans' office.

Yours truly,

J. L. H.

JOHN L. HOWARD.”

Then follow copies of the same letters which have just been read; it will not be necessary to read them again.

We next offer in evidence a letter from John L. Howard to Dr. I. A. Bachman, dated August 27, 1906, reading as follows: [552—192f]

“San Francisco, August 27, 1906.

Dr. I. A. Bachman,

Napa, Junction, California.

Dear Sir:—I have your letter of August 25th about the No. 1 Lime property, and note that you think it should be bought.

Any new stirring by mail in view of the option that was on it, and the trouble about Riedle, may not be advisable, but I am going North I think on September 8th, and will then take the matter up vigorously.

Yours very truly,

JLH.

JOHN L. HOWARD.”

The next is a letter from D. W. Riedle to John L. Howard, dated August 27th, 1906, reading as follows:

“Copy. Montavilla, Portland, Oregon.

John L. Howard, Esq.,

San Francisco.

Dear Sir: Your favor of August 23rd received, and I beg to say that your telegram arrived Friday morning in time before starting for Bellingham.

I also have seen a telegram from the firm of Balfour, Guthrie, San Francisco, to the firm at Portland.

‘Howard professed that Riedle says he is free, etc. etc.’

This is correct, I said so, and I said so to Mr. Burns.

I decided to be independent as I heard the price they asked for the property. I had not asked for salary for month of July and August, besides de-

clared^d to Mr. London that I will (?) September 1st. He asked me to write it, I did so, as you in enclosed (?) can see.

Mr. Burns asked me if you had promised me a position or something else in your new company. I said 'No.' This is true also which you know yourself.

Mr. Burns wants to bluff me last Friday that when you are building they will build also. I believe they will come to terms and you will build together.

I will write you again in a few days. I will stand pat but honest.

Yours very respectfully,

D. W. RIEDLE."

(In lead pencil: "Copy for Dr. Bachman.")
[553—192g]

Attached thereto is the following letter from Riedle to Balfour, Guthrie & Co.:

"Copy: Montavilla, August 16, 1906.
Mess. Balfour, Guthrie & Co.

Sirs: As I am convinced you are going starting the proposed cement work at Kendall, and I think it is not in mutual interest to go on as we have done since, I beg you therefore kindly for a final settlement.

Please be so kind make a proposition to this matter in writing.

Yours very respectfully,

D. W. RIEDLE.

(No answer to-day.)"

At the bottom of the letter first read in this series, in the handwriting of Mr. Howard, are the words

“copy for Dr. Bachman.”

The next is a letter dated August 30th, 1906, from John L. Howard to A. B. Williamson. It reads as follows:

“August 30th, 1906.

A. B. Williamson, Esq.,

c/o Messrs. Balfour, Guthrie & Co.,

416 Jackson Street, City.

Dear Mr. Williamson: To your note of yesterday:

On account of Mr. Smith's absence and some morning engagements, it will not be convenient for me to leave so early as you indicate.

I will, however, go on the 12:30 P. M. boat and be at the Howard Company's office promptly at one tomorrow.

As to the concluding paragraph of your note. I spoke briefly to Mr. Dingee at the Club today.

He wishes to confer with Dr. Bachman, who unfortunately is detained by a labor trouble which began today at Napa Factory. As soon as they may meet, which will be very shortly, they will give me a definite answer to your inquiry.”

At the bottom, in Mr. Howard's handwriting, are the words: “Copy for Mr. Dingee.”

Attached thereto, on a yellow sheet, is the following in the handwriting of Mr. Howard:

“EXTRACT: Since Mr. Balfour arrived we have discussed the cement situation; for reasons he has requested me to ascertain from you whether all negotiations relating to our properties near Sumas [554—192h] are definitely at an end. Kindly send me word tomorrow.

A. B. WILLIAMSON.”

The next is an autograph letter, from Mr. John L. Howard to William J. Dingee, written upon the letter-head of Evans, Coleman and Evans, at Vancouver, B. C., and dated the 12th of September. It reads as follows:

“Vancouver, B. C., 12th Sept’r.

W. J. Dingee, Esq.,

Dear Sir: Arr’d here after a chain lightning trip. Started from Bellingham early yesterday a. m. in an open gasoline car driven by the R. R. supt. for Kendall and after lunch walked up the new trail to the exposed lime stone cliff on the Reidle and Howard claims. Tell the Doctor that he may now reach them *with* shedding a hair. There is an ocean of lime to be seen and as much more that is covered. Took an Engineer with me and told him what we wanted done as to contour lines, tracing the ledge as far down toward the valley floor as possible, ascertaining its real and not *is* apparent width slashing the timber along its face from the valley floor to the top, &c.

He promises to finish his work in a week and I’ll keep after him.

Stopped with Ernest Evans last night, his opinion now is that if B. G. & Co’s last proposal is turned down by the N. W. Cement co. they are likely to let Aman Moore see what he can do, they putting in the property at a certain figure and taking a block of the secutiries in order to get the selling agency. This looks exceedingly probable and further *than they* are likely to have abandoned the foreign company which was their first intention. Beginning

with Monday next when I am in Seattle I will take up freight matters with the great Northern and Northern Pacific.

Yours truly,

JOHN L. HOWARD.

Fine weather until this a. m. It is raining as it knows how to rain in this country."

The next is a letter from John L. Howard to William J. Dingee, dated San Francisco, September 24th, 1906, and reads as follows:

"San Francisco, September 24th, 1906.

W. J. Dingee, Esq.,

1249 Franklin St., City.

My dear Sir: The Northwestern Portland Cement Company will have four outlets for its product:

1—Via Northern Pacific Railroad—

8 miles to Sumas.

125.8 " " Seattle

134.8 " " "

[555—192i]

I saw the General Freight Agent at Tacoma on Sept. 19th, gave him all the data needed and he promised to give me his views within a week regarding rates as far South as Portland, east to Spokane, and as to whether he would make Sumas a terminal.

2—Via Great Northern Railroad—

32 miles to Bellingham.

97 " " Seattle.

129 " " "

Saw the General Freight Agent at Seattle on Sept. 17th, but he could not act and promised to confer

with Mr. B. C. Campbell the V. P. who is expected there during September. He will make Bellingham a terminal.

During the conversation he said they ought to own the B. B. & B. C. R. R. but he presumed that his people couldn't trade with D. O. Mills on price. Intimated that if they desired they could confer with me on this point.

3—Via B. B. & B. C. R. R.

From Kendall 32 miles.

This line is useful for water shipments from Bellingham to points not accessible by other rail lines and in case of disagreement with the B. B. & B. C. rail connections, shipments may be made to points like Seattle, Tacoma and Portland until such time as the N. P. R. R. and the Great Northern Railroad could see their way clear to meet our view of not over 75 cents.

4—Via Canadian Pacific Railroad.

9 miles to Sumas.

36 “ “ Vancouver.

—
45

These people quote \$1.00 but in view of the 50 cents per bbl. duty, we are not likely to make much use of it.

Coming back to the B. B. & B. C. R. R. Mr. Page the 'Pooh Bah' of the concern, i. e. Supt. Gen'l Freight and Passenger Agent etc. and by the way a trustworthy conscientious and economical young Yankee has some idea about freight rates which of course differ from those you have expressed, viz.:

Bellingham to Kendall 32 miles.

Crude oil	3	cents	per	100	lbs.
Coal overd. dock . .	42	“	“	“	“
Gypsum “ “ . .	42	“	“	“	“
“ from Railroad . .	32	“	“	“	“

This includes a wharfage charge of 10 cents per ton, Kendall to Sumas on cement to other railroads 25 cents per ton, for local use 50 cents per ton.

Bellingham on cement for other railroads 32 cents per ton, Bellingham on cement for local use 75 cents per ton.

I intimated that the owners of the cement company were in position to control the railroad when they so desired, and Mr. Hyatt of the B. B. Imp. Co. knew that Cornwall shares had been put in escrow.

But Mr. Page the Railroad Supt seems to have incurred the displeasure of Mr. Taylor through having quoted rates to me in June last, although they were subject to Mr. Taylor's approval and in view of the fact, he cannot as asked to conform to our views until we put [556—192j] ourselves in position to give him an official order. In this case, however, care must be used in three directions.

1. To avoid the possibility of attack from the minority interest in the Railroad who might set up that through your control of it, you were sacrificing them in favor of the cement company, which you likewise control.
2. Regard must be had to the law and to the rules of the Washington Railroad Commission, of which Mr. McMillan is a member. All rates must be published and you may not enjoy a

rate that is not open to others in the same business and located on that line of road.

3. You want eventually to sell the road and we must keep in mind the fact that it should not be handicapped with an unprofitable contract with the cement co. which might militate against the sale.

In view of all these points, I asked Mr. Page to have his lawyer pass upon this point. Whether if he established and published an open rate, the State law would permit him to make and publish reduced rates on a sliding scale graduated upon the total amount of all kinds of tonnage contributed by the Cement Company. If his lawyer reports favorably and if you assume control, then I would have a contract drawn and submitted to Mr. McEnerney, one that would hold whether we kept the road or sold it and one that our successors could not under any sort of plea successfully side step.

I went no further in this matter because I wanted to put the facts before you prior to my again going to Seattle to defend my timber and stone claim against some professional jumpers and perjurers. Meantime you will decide whether the option of the Cornwall stock will be exercised. I think that if the Rialroad investment can be carried, it may be advisable not to negotiate for its sale too soon because there are developments going on in that country that may make the road more valuable than it will be even with your cement industry. To say nothing of some short extensions which it needs to increase traffic, its small equipment of cars are up to their limit. More

rails are needed to improve the line, more transfer yard room is wanted at Bellingham and there are a number of property questions between the R. R. Co. the Mill Company and the Improvements Company, which under the triple headship are handled without clashing, yet in view of the separation of the Railroad will need adjustment.

Yours truly,

JOHN L. HOWARD,

JLH.EGO.

Presd't."

The next is a letter from John L. Howard to Dr. I. A. Bachman, dated October 9, 1906, and reads as follows:

“WESTERN FUEL COMPANY.

San Francisco, October 9, 1906.

Dr. I. A. Bachman,

Napa Junction, California.

Dear Sir: With this please find maps and copy of a letter from E. C. [557—192k] Lyle Engineer at Bellingham.

I directed him to get the contours of the valley land where the limestone Ledge would strike the valley floor, and at same time to figure on such embankment as might be needed to impound the water of Zender's Lake, in case you were forced to a steam generating plant.

You will notice that the lowest part of the exposed ledge is 600 feet above the valley floor. There is no doubt in my mind that it will be found further down when properly stripped; also that he flagged it at a point 600 feet higher up, and as this point is about

the middle of a 40 acre strip, which is 1320 feet long, it is easy to see that the ledge runs 600 feet higher than the upper flag station, so that there is now an exposure of 1200 feet.

As to the water, I asked him to survey a line for dyke around the low border of Zender Lake. This he has done, and shows that if the present low county bridge be filled and fitted with a spillway the capacity of the reservoir will be approximately 30,000,000 gallons.

He did not examine the character of the bottom of the proposed reservoir, but thinks it may be porous.

Yours very truly,
JOHN L. HOWARD."

The next is a letter from John L. Howard to W. J. Dingee, dated October 9, 1906, and reads as follows:

"WESTERN FUEL COMPANY.

San Francisco, Oct. 9, 1906.

W. J. Dingee, *Seq.*,

1249 Franklin Street,

San Francisco, Cal.

Dear Sir: I enclose copies of two letters from the Great Northern and Northern Pacific railroads regarding rates on cement, Sumas to points in Washington.

It is merely a confirmation of what was roughly indicated and to Seattle, Tacoma and Portland the rates are not at all satisfactory.

But we will get there if we do not chase them up too much.

When next in Seattle I will look into the question

of water transportation, and think that we can greatly beat these rates via Bellingham, and to all points reachable by water.

My judgment now is that after paying the B.B. & B.C.R.R. one per cent per ton per mile, we can land Cement in Seattle, and perhaps also in Tacoma, at 75 cents per tons; and when we do it the railroads will come after us for the business.

J.L.H.

Yours very truly,

JOHN L. HOWARD,

Pres'dt." [558—1921]

The next is a letter from John L. Howard to W. J. Dingee of date October 17, 1906, reading as follows:

"Bellingham, Wash, Octo. 17, 1906.

W. J. Dingee, Esq.,

Dear Sir: I ar'd here on time on Monday Evg. Spent most of yesterday with the law investigating the status of the claims of parties who have been jumping our land.

No matter how much care one takes he is open to some kind of attack from these professionals who belong to the class which in S. F. gets money after using pieces of gas pipe on the heads of its victims.

I have succeeded in getting two to withdraw and to promise our lawyer a quit-claim deed.

This is the 2nd bunch that have let go & there is still another that I expect to have in hand by the time I return from Naniamo leaving here in tonight's train. I visited Kendall today but did not venture up the mountain trail during the heavy rain. Mr. Taylor arr'd today on the Canadian Pacific & as the

R.R. Supt. must devote himself to the Presd't. I will come back here after he has gone. He intends visiting Coos Bay to look over the Black Diamond Co's properties on his way home.

I am enclosing the U. S. Patent for the property of Peter Zender which should be filed with Zender's deed to Dr. Bachman.

I am just this moment in rec't of yr telegram of date and will attend to the matters referred to. Have given Zender's U. S. Patent to the lawyer instead of enclosing it.

Will go into this local R. R. matter pretty closely on my return. It looks as tho some money must be spent for extensions to reach timber to take the place of timber this is being rapidly cut from the land tributary to the patent lines.

Yours truly,

JOHN L. HOWARD."

The next is a letter from John L. Howard to William J. Dingee, dated November 17th, 1906, from Seattle, Washington, reading as follows:

"Seattle, Washington, 17th Nov'r, 1906.

W. J. Dingee, Esq.,

Dear Sir: Since writing you this a. m. I lunched with Baillie of B. G. & Co. and a Mr. Anderson, a Director in the English Cement Syndicate, whose total daily output is 25,000 bbls. He is the party that was not permitted to go to Napa but who did visit Santa Cruz with Jones of Spreckles & Co. [559—192m]

He is studying the present and prospective demand

(Testimony of John L. Howard.)

for Cement on the coast and has visited all the existing factories and some of the projected sites for new ones. Has gathered and memorized all the trade talk and gossip and has tabulated the output of all the concerns for 1906-1907-1908. Napa is rated a 2000 per day but Santa Cruz at 4500 but latter will not be able to ship Commercial Cement until the last 5 months of next year. His concern is shipping to all the Atlantic Seaboard points including Panama Canal and also much to the Orient including Manila. Wanted to know why we didn't go for that trade. I told him we couldn't butter the home bread, etc.

Evans believes and there are some indications to warrant it that negotiations are on between his Co. and B. G. & Co. and should this prove true the sooner we 'Get a move on' the better.

Yours truly,

JOHN L. HOWARD."

Q. Who, Mr. Howard, who is referred to when you say B. G. & Co.?

Mr. HOWARD.—Balfour, Guthrie & Company.

Mr. DUNNE.—The next is a letter from John L. Howard to W. J. Dingee, dated at Seattle, November 17, 1906, reading as follows:

"Seattle, Nov. 17, 1906.

W. J. Dingee, Esq.,

858 5th Ave., N. Y.

Dear Sir: I reached here on Thursday 15th prepared to meet the 'Sand-baggers' for the case on my 80 acres set for 16th.

Since then all rail communication with Seattle has

been destroyed by floods. The entire gang of 'Gas pipe' men were here excepting the principal who signed and swore to the protest against me. To enable him to reach here the Registrar has said today that the hearing will positively take place at 10 on Monday. As neither the principal nor his witnesses can reach here it is confidentially expected that the protest will be dismissed and thus the entire land troubles concerning the Dr. and the writer will be cleared away.

I have waited a wire from the Dr. regarding his movements about coming here to take up the new factory question and the price policy for 1907.

As to the first 5 months have gone and we have done very little in the way of progress. B. G. & Co. have been at work and yesterday their Mr. Baillie told Mr. Evans that they now had a better offer in coin for their property than you made them. I have felt and so have you that the first factory in this field would have a great advantage.

The consumption in this field during 1907, is expected to be Very great, and the Vancouver Cement Co. is now about to make its [560—192n] second increase in plant so as to be able to send more into this market. Its quality is very good. Cement prices will be better here. Ball's Puget Sound Agent has contracted with him for 125,000 bbls. B. G. & Co. have the call on room for 15,000 bbls. per mo. at 25 shillings fr't on the steamers that run from London over Suez Canal to Puget Sound. Everything looks rosy here and we should be up and doing. I cannot reach Bellingham now to see how matters are

getting on with the properties but will go by steamer to Victoria on Tuesday A. M. reach Nanaimo Wednesday noon and after finished there will go to Vancouver—thence to Bellingham.

Am just in rec't yr. t.d. from Allentown 15th saying Dr. could not come but is arranging to send experienced parties to build plant. I shall wire you to know if they will start quickly so that if possible I may meet them and explain the property situation.

I trust that Mrs. Dingee is improving.

Yours truly,

JOHN L. HOWARD."

The next is a letter from John L. Howard to W. J. Dingee, dated November 21, 1906, and reads as follows:

"Nanaimo, B.C., 1906, November 21, 1906.

W. J. Dingee, Esq.,

858-5th Ave.,

New York City, N. Y.

Dear Sir: On Monday the U. S. Land Commissioner at Seattle decided with regard to my 80 acres.

1—That I had properly filed on it under the Timber & Stone Act.

2—That by the date of my filing I had a prior right as compared with the protestants.

3—That because the protestant was not present with his witnesses to prosecute the case, he would dismiss the case.

Now although the Land Register & Receiver know that the protestant and his witnesses were professional jumpers, although he was convinced that they did not intend to appear, and although my lawyer

told him in presence of opposing counsel that it was a blackmail scheme, the Commissioner declined to issue to me the Certificate during the 30 days in which by law the protestant may appeal from his decision.

The basis, and absolutely the only basis for such an appeal lies in the fact that owing to the floods, railroad travel was temporarily suspended and this lawyer filed an affidavit that his client would not reach Seattle from Portland and yet I, the defendant, had done it.

If an appeal is taken from the decision of the Seattle Land Agent all the papers in the case must go to Washington, there to be numbered and taken up in regular order. The average time for a decision is said to be 6/8 months and then an appeal may be taken to the Sec't of Interior, which will consume 6 months more and pending [561—1920] the final decision no one may use the property.

Here's a mess with positively no slip or error in any part of the proceedings that I have taken, and yet a gang of professional rogues sided by an equally bad lawyer can block progress and cause delay in order to extort blackmail.

My lawyer, who is very able in Land Office practice, and is probably as bad as the rest of them, hinted that if delay would be expensive it might be better to give the gang \$400/500 and get rid of them. I verily believe that although the suggestion is a good one in the matter of policy for me, it was prompted by the desire to get for the other lawyer and from me the fee that that lawyer could not get from his own client. I am *awiting* to hear from him, but i'll

get the trouble out of the way and no more taking up of land for me.

I wired you to know when the 'Experienced parties' will be here because if I have much more to do with these local harpies I am likely to commit murder and if I get into jail it is a poor place from which to manage a cement business.

I trust that you are well and that Mrs. Dingee is improving.

If you and the Doctor are converting lime, clay and 'water' into millions, keep in mind a chance for the Subscriber who is pulling his 'coldnosed' friends for the wherewithal to pay dividends.

Yours very truly,

JOHN L. HOWARD."

(A recess was here taken until 2 P. M.)

Mr. DUNNE.—The next is a letter from John L. Howard to W. J. Dingee, under date of January 9th, 1907, reading as follows:

"San Francisco, Jan. 9, 1907.

W. J. Dingee, Esq.,
1249 Franklin Street,
City.

Dear Sir: Under date of January 4th our Bellingham Attorney advises that all the assessment work required on the Riedle claims has been completed, the proof of same has been prepared and would be filed on January 5th.

This means the application for a U. S. Patent, which when obtained is invulnerable.

As to the Howard 80 acres, the lawyer for the

blackmail gang filed his protest against the decision of the U. s. Local Land Office in Seattle which was in my favor.

This sends the case to Washington, and will cause both delay and expense. Pending the decision neither of the litigants may enter into occupation of the land.

My opponent has done no work on his claims during the sixty days following his entry, and has therefore forfeited any right.

My lawyer said that he cannot possibly win against my position. But they all agree with me that new placer claims may be [562—192p] filed in my interest and under these, assessment work may be done by the filers, and this work may be made to conform to the general and ultimate plan of development.

In either or both cases I am bound to win.

Yours truly,

JOHN L. HOWARD."

J.L.H.

The next one is a letter from John L. Howard to W. J. Dingee, dated January 21, 1907, reading as follows:

"San Francisco, January 21, 1907.

W. J. Dingee, Esq.,
1249 Franklin Street,
City.

Dear Sir:

I enclose copy of a letter from Ernest Evans bearing on the subject of Electric Power for Kendall, Washington.

This scheme offers the best opportunity for our

getting the juice. I have been working with the projecture for several months.

Please forward to the Doctor, he will be interested in the information.

Yours truly,

JOHN L. HOWARD."

The following letter is attached:

"Vancouver, B. C., 16th January, 1907.

John L. Howard, Esq.,

87 Vernon Street,

Oakland, California.

Dear Mr. Howard:

Mr. McNeill of the State Lake Power Co. called on me today and stated that after going into the matter with Mr. Kennedy of Montreal, their consulting engineer, they had decided to write to Mr. Bonnycastle, who is a practical Electrical Engineer in Montreal, to come out here at once to go over to the proposed pole line and finally check up all estimates of the cost of delivering power to Kendall.

Mr. McNeill assures me that, unless something very unfortunate happens, they will be able to give us a definite proposal within three weeks, but he could give me no idea as to the probable rate that they would charge per horse power.

He states that he could not have the installation completed, in the event of our coming to terms, and the power actually turned on, before the early summer of 1908, and when I taxed him as to what he called the early summer, he said *June*.

I then asked him whether in the event of our coming to terms, if they would sign a contract guaran-

teeing to deliver power by [563—192q] a certain day and a heavy penalty for delay, and he stated that they would, with the usual protection clauses inserted.

There seems to be no doubt but that the company are going into this matter in earnest. At the same time, the delay in getting a definite proposition is very annoying.

Yours faithfully,

ERNEST E. EVANS."

The next is a letter from John L. Howard to W. J. Dingee, on autograph letter, dated February 19th, 1907, reading as follows:

"Feby. 19, 1907.

W. J. Dingee, Esq.,

Dear Sir:

Here's something which if true should put a little pepper under the Dr's tail and get a move on his plans.

It is nearly 8 months since he visited Kendall, yet owing to his grasshopperlife I presume he has not realized the *light* of time.

I will not reach Bellingham until next week and then see what may be learned about this new scheme.

Yours truly,

JOHN L. HOWARD."

This has attached to it a newspaper clipping, the headline of which is: "A new Industry for Bellingham; construction of Two Million Dollar Cement Plant Contemplated."

(Testimony of John L. Howard.)

Mr. OLNEY.—Mr. Howard, that was somebody else's cement plant, was it not?

Mr. HOWARD.—Yes.

Mr. DUNNE.—Yes, a rival cement plant.

The next is a letter written by John L. Howard to W. J. Dingee, under date of March 4, 1907, and reading as follows:

“W. J. Dingee, Esq.,
Fifth Ave.,
New York City.

Dear Mr. Dingee:

I returned from the North on Saturday, and trust that Mrs. Dingee and you had a safe journey overland.

I am sending to you copy of a letter addressed to President Taylor, which will put before him, and probably also before the [564—192r] Directors, some of the pressing needs of the Railroad Company.

If he calls a meeting I will tell them more than I cared to burden a letter with, but we must ‘get busy’ with that property for men and material are difficult to obtain, perhaps the money will be as difficult.

It is said that the road was a pet plaything of Mr. Cornwall's and it looks like it.

One thing is certain, we must have a policy other than that of letting Mr. Dingee be there to use what he has to make the little that he can so long as he does not call on Mr. Taylor for money.

He has got to have some new money or he can't get ready to handle your business.

Your purpose is to first get a fair transportation contract, and then get the property in shape to be attractive to some other line.

I do not know if this is Mr. Taylor's idea, but Piage while a close economical manager, needs to have mapped out for him a definite policy. He needs being seen more often.

I am to meet Mr. Adams, Asst. Traffic Manager of Great Northern Railroad, on his way North from Southern California, to discuss freight matters, and will write you the result.

I think you levanted from San Francisco fearing the look of my reprooving eye at the February output of only 32,964 barrels.

I'll not have to hunt any 'coldnosed Uncle' with any such figures. I'll get the Doctor here during the week and upload my budget of Northern news.

McMillan admitted to me on Thursday last in Seattle that he was free to negotiate for a cement plant at Roche Harbor, which means that Frank L. Brown has not buttoned him up.

Yours truly,

JOHN L. HOWARD."

There is attached to this another letter which is addressed to Mr. H. H. Taylor, and written in lead pencil at the top of the page, in Mr. Howard's handwriting, are the words: "Mr. Dingee." The attached letter reads as follows:

“San Francisco, March 4, 1907.

Mr. H. H. Taylor,

Presd't B. B. & B. C. Railroad,

Bellingham—Washington.

Dear Sir: It is evident to even a casual observer that the B.B.&B.C. Railroad is suffering from the original sin of bad location, and cheap construction. This is reflected in the operating cost. [565—192s]

Some of the faults are remediable, and on the present location some are not.

Without entering into a discussion of all the manifest needs of the company, it seemed to the writer that the following items were of a pressing nature, partly to give better value to the property and partly in preparation for the handling of the tonnage that will be thrown upon the line in 1908, through the establishment of the Cement Plant at Kendall.

1. *Rials*—The main line at present is laid with an assortment of metal, viz.:

4 miles	of	50 lb.	Steel.	
2	“	“	55 “	“
17	“	“	56 “	“
22.8	“	“	60 “	“
5.3	“	“	50 “	“ Linton Branch.

The Cement Company's plans indicate the need of four miles of spur and yard tracks.

It will be necessary to procure at least five miles of 60 lbs. rails, place them in the main line and use the 50 lb. steel thus displaced in the Cement Company's Yard.

According to Railroad practice the Cement Com-

pany should pay for the grading and all the ties used North of the Company's main line and the Railroad Company should furnish and own the Rails and Fittings.

Indeed it should be suggested that the Cement Company should pay for and own all the sidings located on land which it owns.

These new rails should be purchased at once because of the delay in getting orders filled.

MOTIVE POWER.

The Company owns

8 Baldwin Locomotives

2 Freight Engines.

3 Passenger Engines.

1 Switch Engine at Bellingham

1 " " " Sumas

1 " " " Lumber Mill.

It would be advisable to sell the two last-named and invest the proceeds in a new heavy Freight Engine.

EQUIPMENT CONSIST OF.

84 flat cars ranging from 30,000 to 80,000 lbs.
but chiefly of 60,000# capacity.

50 box cars of 60,000# capacity.

6 " " " 30,000# "

4 first class coaches.

3 combination box and mail

3 cabooses. [566—192t]

There is a movement among railroads to change the rate from 25¢ to 50¢ and perhaps 75¢ for each

day that a foreign car is kept on a connecting line.

If we consider that from Bellingham to Kendall would consume on the average at least two days, then a forty ton freight car at 50¢ per day would cost our company $21\frac{1}{2}$ cents per ton.

Again, at the date of this writing there is the strong probability that the Washington Legislature will pass what is known as the Reciprocal Demurrage Act, under which Railroad Companies are liable to severe penalties in case of failure to supply cars to shippers within six days from the date of application for empty cars.

The probably and natural effect of this will be a constant difficulty on our part to secure foreign cars for destination at points off our line, because our connections will naturally first supply the calls from customers on their own lines.

Again it is entirely probably that Cement shipments to Tacoma and Portland must be made by water via Bellingham, This Company must furnish its own cars for this purpose.

To Seattle and all other points on rail lines deliveries will be made by rail, and it may be frequently necessary for this Company to supply the cars.

The present equipment of box cars is not sufficient to supply this demand over the present volume of business.

Early provision should be made for

- 1 new Coach.
- 16 “ flat cars.
- 50 “ box cars and 50 more to follow.

ROADBED: The bridges and trestles are reported to be and are in apparent good order, but there is a great need of rebalasting in places, and the Superintendent estimates the amount of 15 miles at an average cost of \$400 per mile.

TERMINAL FACILITIES: There should be constructed at once a freight depot in the town for the receipt and delivery of local business.

At present it is all handled in the freight shed on the Wharf, which is already congested, and the distance which the Merchants are compelled to haul is the source of continual and just complaint.

The small wharf on the site subleased from the B. Bay Impt. Co. is now inadequate for the business and is practically useless on one side owing to the encroachment of ships that load timbers from the adjoining mill. The north slip needs dredging to make it more available.

The Superintendent has been requested to submit the plan and estimate of cost for a new wharf twenty feet north of the present one. [567—192u]

Indeed without this it will be impossible to handle the volume of business which it is reasonably expected the Cement Company will ship by water and beside it will furnish facilities for cargo shipments of timber for mills now on the line of the railroad:

This plan if carried out will necessitate a new arrangement for a least of tide land from the B. B. Improvement Co.

The narrowness of the water front at Bellingham the certainty in the near future that other rails lines will seek entrance to that City, and the crying need

of this Company for better terminals better yard limits and a better connection between the water front and its main line beyond the City makes the consideration of what is known as the Squalicum Line somewhat imperative.

This will involve the construction of $6\frac{1}{4}$ miles, leaving the present main line beyond the City and running on a water grade of one percent. towards the bay, this escaping the present grades of 2% into and 2.5% out of the City.

Much of the water front right of way has already been procured for the Railroad by the B. B. Impt. Co.

This line should have been adopted in the beginning; the longer the construction is deferred the more difficult and costly it will become, the more complications will surely be encountered, and indeed the change is vitally necessary to give permanent value to the property.

To provide the necessary funds for these recommendations it may be thought wise to sell the unissued bonds, retire the floating debt and use the balance as far as it may go towards carrying out those first suggestions which seem most pressing, depending upon the increased earnings to take *care* of the augmented interest charge, and to gradually encompass those parts of the general improvement scheme which may with safety be deferred.

Yours truly."

Mr. BROBECK.—How is that signed—is it signed "John J. Howard"?

Mr. DUNNE.—No, is signed "Vice-President B. B. & B. C. Railroad."

The next is a letter from Mr. John L. Howard to W. J. Dingee, under date of March 5, 1907, reading as follows:

“San Francisco, March 5, 1907.

W. J. Dingee, Esq.,

#858 Fifth Avenue,

New York City, N. Y.

Dear Mr. Dingee: History is making so rapidly that I am sending you some Railroad news which it is fresh.

If you don't want business letters while in New York, the slightest hint will stop them.

President Taylor called this P. M. with my letter, of which you have a copy. [568—192v]

My recommendations for Railroad Equipment were based on Paige's guess that there were \$600,000 bonds outstanding, and that the floating debt was about \$150,000.

Mr. Taylor says the debt stands:

Bonds.....\$659,000

Due D. O. Mills..... 111,000

“ B. C. Coal Mining Co.....139,000

\$909,000

Further that the deed of trust contains many objectionable provisions that were inspired or permitted by P. B. Cornwall; that The latter's connection with this bone issue was in *sone* way not creditable; that E. H. Rollins & Sons have the call on the balance of the bonds at \$95; that bonds may be issued only on main line construction, and that the road

must always earn double the amount of the bond interest. These are some of the things.

He has in mind the increase of shares and the distribution of the increase among present owners.

I do not see any wisdom in this move, but more to the purpose he suggests a new bond issue with less objectionable features and more latitude than the present deed of trust.

His idea being that a larger issue of new bonds will retire those outstanding, pay the floating debt, and leave a margin for improvements.

I am to meet him within a week to discuss a plan for submission to Mr. McEnerney.

Lunched with the Doctor yesterday. Among other things discussed Santa Cruz scheme. He is mindful of his wicked partner who skipped to New York to avoid the ire of the sales agent on 36,000 barrel output.

Yours truly,
JOHN L. HOWARD."

The next is a letter from John L. Howard to Dr. I. A. Bachman, at Napa Junction, California, under date of March 18, 1907, reading as follows:

"San Francisco, March 18, 1907.

Dr. I. A. Bachman,
Napa Junction,
California.

Dear Sir: The firm of Newman & Howard, Attorneys at Bellingham set for the

Bellingham Bay Improvement Co.
Bellingham Mill Company.

Bellingham Bay & British Columbia Railroad
which are all inter-related. [569—192w]

They get a salary of \$5000 per year, which is prorated among the companies.

Mr. Howard is an eminently capable lawyer, and I have used him in connection with the title tangles of the Kendall lands. At my suggestion he was made the legal agent in Washington of the N. W. Portland Cement Company, and you could get no better man for the place.

During my last visit the question of compensation arose. I asked him to leave the matter in abeyance as Mr. Dingee expected to visit the region about the first of May, that you might probably join him there, and then the question could be settled as to whether you wished to pay a regular salary or pay for services as rendered.

Unless the amount be too great the first named method might prove the more satisfactory.

In the event that neither you nor I may be able to meet Mr. Dingee at the time of his visit North, you might send him this letter in order that the subject may be taken up while he is there.

Yours truly,
JOHN L. HOWARD."

The next is a letter from Mr. Howard to Dr. Bachman, under date of March 21, 1907, reading as follows:

"San Francisco, March 21, 1907.

Dr. I. A. Bachman,

Napa Junction, California.

Dear Sir: Herewith copy of a letter from Mr. Tay-

lor which indicates that in so far as E. H. Rollins & Sons are concerned, we have no reason to hope for the placing of a new bond issue, and we must either change our plan or seek some other channel to carry out our present ideas.

I think I have solved the problem of protecting the N. W. P. Cement Co. against the possible competition of a rival plant.

Under the law there is no possible way in which that Railroad Company may give it a preferential rate, even if we consider the great disparity in the volume of business contributed by its factory as compared with a smaller one.

Let the Railroad Company or an adjunct build two or more barges to carry 1000 tons each and to be towed.

The combination of the *Railr* rate with the Barge rate will enable us to reach Seattle at a lower cost than the Great Northern or N. P. R. R. rate of \$1.00 plus the local on the B. B. & B. C. R. R. and very much lower than the \$1.00 plus local to Tacoma.

The B. B. & B. C. will thus get the entire haul to Bellingham on all the water-borne shipments which will add to its Earnings and it [570—192x] can name the same rail rates to others that it names to you.

Seattle and Tacoma will for the time being be the largest consuming and distributing centers.

The Barge business will settle the rate problem.

Yours truly,

JOHN L. HOWARD."

And attached is the following letter:

“March 20, 1907.

Mr. John L. Howard,

Vice-Pres'dt B. B. & B. C. R. R. Co.

Dear Sir: Today I had a talk with Mr. Batchelder of E. H. Rollins & Sons regarding the proposed new bond issue, and he told me that nothing could be done by his concern in the way of floating the new bonds, because the earnings of the road were inadequate, and that the only course he thought we could pursue would be to carry out our plans of financing and have the bonds underwritten by the stockholders. He claimed that if the new improvement, coupled with the increased business, should increase the earnings of the road to the extent that we anticipate, the bonds would be salable, but not otherwise.

Very respectfully,

(Signed) H. H. TAYLOR.”

The next is a letter from Mr. Howard to W. J. Dingee at 858 Fifth Avenue, New York City, under date of March 27, 1907, reading as follows:

“WESTERN FUEL COMPANY.

San Francisco, March 27, 1907.

W. J. Dingee, Esq.,

858 Fifth Avenue,

New York City, N. Y.

Dear Mr. Dingee: Herewith copy of a letter from Mr. Taylor indicating that Mr. Taylor has in mind the meeting of you and Mr. *mills* on the subject of the Railroad Company's finances.

I have given Mr. Paige my judgment that for the time being Mr. Maney could be quoted a rate of 50

cents either in raw material or finished product from Kendall to Bellingham.

It may interest you to know that our sales of Cement so far this year are 869,529 barrels.

Mr. McGary promised to start the Santa Cruz Wheels yesterday. They did not start, therefore he is no better than the rest of you, but the Doctor thinks they will turn at the end of this week to make Clinker, and therefore the writer and Mr. Girvan will begin to day on the Lime proposition and expect during this week to place the orders for the kilns.

Please keep me advised about your future intentions, if you [571—192y] expect to return via the Canadian Pacific and stop at Bellingham, if you will indicate the date when you will be at Bellingham, if you think I can be of any service to you, I will plan my next trip to the Mines to meet you.

A long continued storm seems to have passed, and today is clear. A tremendous amount of damage has been done throughout the state.

Did you know that the Pennsylvania Moravian wants me to consider the sale of your Eastern product? I have had an attack of heart failure since his first mention of it.

I trust you are having a good time.

Yours truly,

JOHN L. HOWARD."

The following is attached: It is marked in the upper left-hand corner, "Copy for Mr. Dingee."

“San Francisco, Calif., March 26, 1907.

Mr. John L. Howard,

Vice-Presdt B. B. & B. C. R. R. Co.

Dear Sir: I am in receipt of a communication from Mr. Paige, enclosing copy of a letter to him from Mr. J. J. Maney, of which *te* following are copies.

‘March 21, 1907.

Mr. H. H. Taylor, Presdt.

Dear Sir: Enclosed herewith is a copy of a letter received from Mr. Maney in regard to Cement rates. Will you kindly advise what reply I shall make to him.

“Seattle, Washington, March 18, 1907.

W. B. Paige, Supt.

Bellingham, Washington.

Dear Sir: Some weeks ago I wrote Mr. H. H. Taylor, President of your road, and asking for a *Tarrif* rate on lime, cement etc. from Kendall to Sumas and Bellingham.

In answer to this letter I received a reply from Mr. Taylor Saying he expected to be in Bellingham within the next two weeks and would take the matter of our application for rates up at that time.

Later, while in your City I took the matter up with you personally for the purpose of explaining more fully our requirements [572—192z] than could be done by correspondence.

Some weeks have elapsed since that time, but as yet have not heard either from Mr. Taylor or from yourself in regard to the subject matter, and I write to call your attention to this fact and ask you to ad-

wise me as soon as possible, just what has been done, or what you propose to do in regard to our specific request, or if you have any information as to when Mr. Taylor expects to be in *Bellingha* to take these matters up personally.

Yours truly,
J. J. MANEY." "

Will you kindly reply to it. Previous communication from and to Mr. Maney are on file in this office.

I will not leave for the East until Thursday evening, and if you are to see me about anything I will arrange an interview with you in the meantime.

It is plain that activity of the cement plant demands corresponding activity on the part of the Railroad, but the question as to how the Railroad Company can finance the new work demanded of it is still open. I intend, of course, to take the matter up in New York, and, if possible, arrange a meeting between Mr. *dingee* and Mr. Mills, in the hope that they can place us in the way of raising funds there, E. H. Rollins & Sons here evidently not caring to handle the matter.

Yours respectively,
W. H. TAYLOR,
Presdt."

The next is a letter which is signed John L. Howard—D. C. N. addressed to W. J. Dingee, dated May 28, 1908, reading as follows:

“San Francisco, Cal., May 28, 1908.

W. J. Dingee, Esq.,
Crocker Building,
City.

Dear Sir: Will you kindly acknowledge receipt of my letter of May 14th enclosing 8900 shares of Northwestern Portland Cement Company, which were endorsed to your order.

Yours truly,
JOHN L. HOWARD, D. C. N.”

Mr. Howard, those are the initials of Mr. Norcross, the Secretary of your company?

Mr. HOWARD.—Yes.

Mr. DUNNE.—The next is a letter signed “John L. Howard—D. C. N., addressed to W. J. Dingee, under date of June 3, 1908, reading as follows:
[573—192aa]

“San Francisco, Cal., June 3, 1908.

W. J. Dingee, Esq.,
Crocker Building,
San Francisco Cal.

Dear Sir: Among the certificates of the Northwestern Portland Cement Company sent you were two which the stockholders requested should be taken out of their names to avoid stockholders' liability.

We considered the endorsement on the back sufficient, but the attorney for one of the stockholders (Mr. George W. Spencer deceased) has requested

that we kindly have this done to avoid any complications.

As these shares were all transferred to your order, will you kindly have the necessary transfer made, advising me when this is done that I may communicate with those interested.

Yours truly,
JOHN L. HOWARD, D. C. N."

Q. The initials "D. C. N." mean that the letter was actually written by Mr. Norcross?

Mr. HOWARD.—The letter was dictated and it was signed by Mr. Norcross.

Mr. DUNNE.—The next is a letter under date of July 18, 1908, addressed to Mr. Dingee and signed by D. C. Norcross, reading as follows:

"San Francisco, Calif., July 18, 1908.
W. J. Dingee, Esq.,
Crocker Building,
San Francisco.

Dear Sir: Enclose are two forms of notes to be signed in connection with ten bonds of the Northwestern Portland Cement Company which I will hand you on execution of these notes.

Yours truly,
D. C. NORCROSS."

Attached to this letter are two forms of notes, reading as follows:

"San Francisco, May 1st, 1908.

For value received the Standard Portland Cement Corporation promises to pay to the order of E. H.

Warner, on or before one year from and after May 1st, 1908, the sum of Five Thousand Dollars, with interest thereon from said day until paid, at the rate of six per cent per annum, payable semiannually and if not so paid to be compounded. [574--192bb]

STANDARD PORTLAND CEMENT COMPANY.

By, Prs't.

By, Secty."

(The letters "m-p-a-n-y" are scratched out with lead pencil and "r-p-o-r-a-l" inserted over top.)

"San Francisco, May 1st, 1908.

For value received the Standard Portland Cement Corporation promises to pay to the order of W. P. Warner, on or before one year from and after May first, 1908, the sum of Five Thousand Dollars with interest thereon from said day until paid, at the rate of six per cent per annum, payable semiannually, and if not so paid to be compounded.

STANDARD PORTLAND CEMENT CORP.

By, Pres'dt.

By, Secretary."

The next is a copy of a letter from John L. Howard to W. J. Dingee, under date of November 24, 1908, reading as follows:

"Copy.

November 24, 1908.

W. J. Dingee,

San Francisco, Cal.

Dear Sir: I have been able to confer with only a few of the resident subscribers to the bonds of the Northwestern Portland Cement Company some be-

ing absent and others living in Vancouver, B. C. and in England, but on behalf of the parties holding the notes of the Standard Portland Cement Corporation for \$100000 in the aggregate, given as the purchase of the bonds of the Northwestern Portland Cement Company and endorsed by you, I agree to extend the time of payment of said notes to November 1, 1909, provided you will carry out the suggestion made last night by you over the telephone—to convey to me an unencumbered title to 800 acres of land at Redwood City, San Mateo County, said by you to be worth \$200,000 or more, for the purpose of securing the payment of said notes.

I further agree that in consideration of the said conveyance I will exhaust said security by private sales of the land at the best prices obtainable before taking any action against the ~~marker~~ maker or endorser.

I shall want the privilege of withdrawing this agreement and reconveying the land to you within thirty days if my principals refuse to ratify this agreement.

If this proposal is satisfactory, please send me at [575—192cc] once the abstract of title for the property in question.

Yours truly,

JOHN L. HOWARD.”

Mr. OLNEY.—In connection with that letter, Mr. Dunne, I would like just at this time to ask Mr. Howard a question, if there is no objection.

Mr. DUNNE.—Certainly; no objection.

Mr. OLNEY.—Mr. Howard, the land at Redwood City, which is referred to in that letter, is or is not the same land as that which was conveyed to you as security for a loan of \$75,000 by the Western Building Material Company to Mr. Dingee, or the Cement Company?

A. It was understood to be an entirely different piece.

Mr. DUNNE.—The next is a letter signed by John L. Howard and addressed to W. J. Dingee, under date of December 10, 1908, reading as follows:

“San Francisco, December 10, 1908.

W. J. Dingee, Esq.,
Mills Building,
City.

Dear Sir: Referring to my letter to you of November 24th, (copy of which I enclose) Mr. Evans of Vancouver writes that he is shortly to leave for England, and in behalf of himself and of some friends there, whom he will see, all of whom bought Northwestern Cement Company's bonds, he wishes to know the result of the negotiations with you respecting your proposed guarantee of the Standard Portland Cement Corporation notes that were taken by them in exchange for the bonds.

I have not heard from you as promised, and think that unless I can send them some definite word, he will before leaving, press through other means for the payment by the Cement Company of the overdue interest.

Please let me know what, if anything I can say to him.

Yours truly,

JOHN L. HOWARD.

JLH.”

The next is a letter from John L. Howard to L. F. Young, Esq., [576—192dd] the Secretary of the Standard Portland Co. under date of July 8, 1909, reading as follows:

“July 8, 1909.

L. F. Young, Esq.,

Secretary, Standard Portland Cement Co.

San Francisco, Cal.

Dear Sir: In the matter of the land in Whatcom County, Washington, I made use of the certificate, which you were kind enough to send me, and obtained the United States Patent which has been duly recorded.

According to promise, I now send you the recorded patent for attachment to the deed which I gave your company.

Does the way seem any more clear to you for the carrying out of your suggestion of paying the note for this property that I hold and charging the amount in account to the Northwestern Portland Cement Company?

Yours truly,

JLH.

President.”

And now, gentlemen, I offer in evidence this package containing the following letters pinned together.

The first is a yellow sheet on which is written in the handwriting of Mr. Howard:

“Respy. Ref’d to

Dr. I. A. Bachman,

J. L. H.”

The next is a slip of white paper, on which is written—and I would like to have your admission, Mr. Olney, that this is in the handwriting of Mr. Evans (showing).

Mr. OLNEY.—All right.

Mr. DUNNE.—It is admitted that the following words on this white slip, which I am about to read are in the handwriting of Ernest E. Evans:

“I presume the reason we get these letters is on a/c of the paragraph on the front page of the S. F. Commercial News of 21st inst. I wonder where they got the news from. E. E. E.”

The other letters are business letters, one from the Union Oil of California, addressed to Messrs. Evans, Coleman & Evans, [577—192ee] Kendall, Washington, under date of Seattle, Washington, July 18, 1906, and dealing with fuel oil.

Mr. BROBECK.—Dealing with a proposed sale of fuel oil machinery to M. Evans, or his proposed cement plant.

Mr. DUNNE.—Yes, the introductory sentence being this:

“We can supply you with fuel oil for your proposed Cement works at prices so much cheaper than the cost of coal that you should certainly investigate the matter fully before closing a coal contract.”

The next is a copy of the one just referred to. The next is a letter from Kilbourne & Clark, to Evans, Coleman & Evans, Kendall, Washington, dated July 16th, 1906, in introductory sentence of which is the following:

“We note that you contemplate the construction of a cement plant at Kendall in the near future and are very anxious that an opportunity be afforded us to figure with you on engines and electric light for same.”

The last one is a letter from the Western Mining Supply Company to Evans, Coleman & Evans at Kendall, Washington, dated Seattle, Washington, July 16, 1906, the introductory sentence of which is as follows:

“We understand that you are about to erect the largest cement plant in the United States and should like to have an opportunity of *interest* you in our Cochrane Feed Water Heaters and Separators.”

I next offer the following letter from John L. Howard to W. J. Dingee, under date of August 18th, 1906.

“San Francisco, August 18th, 1906.

W. J. Dingee, Esq.,

1249 Franklin Street, City.

Dear Sir: With this I send you letter from Ernest E. Evans enclosing statement and bills of expense incurred in connection with the Cement property at Kendall.

I have examined them and find them to be in order. If any explanations are needed as to details, I can furnish them. [578—192ff]

Will you kindly send me check for the amount,
\$1019.30?

Yours very truly,

JOHN L. HOWARD.

JLH/EGO."

Attached to which is a letter from John L. Howard to W. J. Dingee, under date of August 25, 1906, reading as follows:

"San Francisco, August 25, 1906.

W. J. Dingee, Esq.,

Post & Franklin Streets,

San Francisco, Cal.

Dear Sir:

I beg to return the S/aact. and vouchers of Evans, Coleman and Evans in connection with the Kendall property, having seen what I wished.

Very truly yours,

JOHN L. HOWARD."

The third paper is a letter under date of August 14, 1906, to Mr. Howard, from E. E. Evans, reading as follows:

"Vancouver, B. C., August 14th, 1906. J.

Dear Mr. Howard:

Cement Property.

I have received advice from Rose & Craven that the \$3900 due on the Watson land was paid yesterday, and they advise me that they will get the deed and file it for record.

I enclose account of disbursements made up to daye, with vouchers attached, all of which I expect you will find in order, although you will notice a

difference of 50¢ between the amount of Mr. Cupples' bill and the amount actually paid. This 50¢ was an item that Reidle left out of his own account.

Yours very truly,

E. E. EVANS.

John L. Howard, Esq.,
San Francisco, Cal."

And then follow the accompanying vouchers. The next is a letter from Mr. Dingee to Dr. Bachman, under date of August 31, 1906, reading as follows:

"San Francisco, Cal., August 31, 1906.

My dear Doctor: The enclosed explains a conversation I had with [579—192gg] Mr. Howard yesterday at the Club, when he told me that Williamson had written him asking if all the negotiations for the Balfour Guthrie Co. property at Sumas had been dropped, and asked me what answer he should make. I told him to advise the gentleman that we had a strike on up there and it was uncertain when you would come down, but when you did, I would take it up with you. I thought it was better to give them some such a 'jolly' as that rather than to have ~~to~~ everything off where they might take some action before we got more Established there ourselves.

Sincerely yours,

WILLIAM J. DINGEE.

Dr. Irving A. Bachman,
Napa Junction, Calif."

The next is a letter dated August 7, 1906, from John L. Howard to William J. Dingee, reading as follows:

“August 7, 1906.

W. J. Dingee, Esq.,
1240 Franklin Street,
San Francisco, Cal.

Dear Sir: By Dr. Bachman's direction I bought what was known on the map as Mansard's 160 acres land at Kendall.

Evans paid the \$100 that secured the option, and has now drawn on me through a Bellingham Bank for \$3900.

I have paid this draft but the Doctor is out of town. Will you cash it, or shall I hold it and send it to him at Napa?

Yours truly,

JLH.”

The next is a letter dated August 20th, 1906, from William J. Dingee to John L. Howard, reading as follows:

“San Francisco, Aug. 20th, 1906.

John L. Howard, Esq.,
City.

My dear Mr. Howard:—

Your favor, enclosing vouchers etc., account of expenditures by Mr. Evans on behalf of the Puget Sound project, is received, and I herewith send you check for \$1,019.30, covering the same.

Sincerely yours,
WILLIAM J. DINGEE.”

Below that is the following, written in blue pencil in Mr. Howard's handwriting:

"D. C. N.

This account is to be sent to Evans C. & E., Vancouver. Send quickly." [580—192hh]

And below that, written in ink, is the following:

"Please endorse and I'll get exchange. D.C.N."

The next is a letter dated Aug. 24, 1906, from William J. Dingee to Jno. L. Howard, reading as follows:

"San Francisco, California, Aug. 24, 1906.

John L. Howard, Esq.,

City.

My dear Mr. Howard:

Your favor of the 23rd inst. is just received, and, he requested, I return herewith Mr. Evan's letter to you together with the vouchers, covering the amount of the check that we sent you some days ago.

I don't understand how they could get a rate of 50¢ and I doubt it very much.

Yours sincerely,

WILLIAM J. DINGEE."

The letter following is a letter from John L. Howard to Dr. L. A. Bachman, dated Sept. 24, 1906, and reads as follows:

"Sept. 24, '06.

Dr. L. A. Bachman,

Napa Junction, Calif.

Dear Sir: When you get started at construction work at Kendall I wish you could find place of a

man named Stewart, who erected our structure at new Northfield Mine.

He is an educated Schotchman, a fine carpenter, and an excellent handler of men, besides he is very reliable.

Our construction work being complete we have no further use for him, but if you can get him I think you will regard him as a great find.

Yours very truly."

The next is a letter from John L. Howard to Mr. C. W. Howard, under date of October 4th, 1906, and reads as follows:

"Mr. C. W. Howard,
c/o Newman & Howard,
Bellingham, Wash.

Dear Sir: I have your letter September 29th: Last week I sent to Mr. Ernest Evans copies of papers on file in the U. S. Land office connected with my filing on 80 acres and the protest of one Birdwell. With them was a circumstantial account of all my doings in connection with that transaction and Mr. Evans was with me throughout the proceedings and knows fully as much as I do. [581—192ii]

I asked him to confer with you regarding this matter and perhaps he may have done so already.

Regarding the contest in which Reidle figured for Balfour Guthrie & Co. his statement to me was that his final defeat grew out of the fact that his opponent testified to having found precious metals on those claims and in paying quantity. Both his en-

glish and his enunciation make it difficult sometimes to understand him.

In the matter of my filing: I went at Reidle's request to F. F. Randolph a Seattle Land Lawyer who won the above mentioned case against him and Randolph many times asserted that under the rulings Limestone could be taken up under the Stone and Timber act, although you will learn from Mr. Evans that at the time of the filing, neither he nor I and in so far as we knew, no one else had knowledge of the existence of Limestone on those 80 acres, nor in so far as we learned had there been any previous filings of any kind.

I do not know whether in law this would cut any figure. I mean where conditions as believed at the time are found to be at variance with after developments.

While writing you, I must confess to an instinctive want of confidence in Mr. Randolph. I don't want to be unfair, even in my mind to anyone and I cannot without the use of too many words better describe my feeling. Some little things done and said and the apparent rough and unsystematic office management have on reflection made me feel a bit uneasy about him and if the feeling grows, I may want to get some further advice from you.

I will fight that jumper gang as long as the courts will let me spend my money on them, unless that protest is withdrawn.

That law firm on your floor I have forgotten the name were solicitious about my movements in the North and took pains to keep posted.

They represent Balfour Guthrie & Company, who own lime depoist near Kendall with some intention of putting up Cement Works.

Yours truly."

The next is a letter from John L. Howard to F. F. Randolph, under date of October 31, 1906, reading as follows:

"Copy E. E. Evans, Esq.

October 31, 1906.

F. F. Randolph, Esq.,

413 Pacific Block,

Seattle, Washington.

Dear Sir:— I have yours of October 27th. The eighty acres adjoining the eighty upon which I filed were paid for by I. A. Bachman who I understnad, has deeded his interest to the Northwestern Portland Cement Company.

I do not know who are the officers of that corporation, but I am not a shareowner. [582—192jj]

He and W. J. Dingee are the *principal* in the movement. Mr. Dingee is now there and will await his arrival, so that you see it will be impossible for me to get either of them to be present in Seattle on November 16th.

I am therefore the only available witness capable of testifying as to whether I made that entry for my own use and benefit.

The resolution to make this filing was reached only a day or two before I first saw you on July 7th, and none of the San Francisco parties know of my act.

I think I did not tell them of it until about July

20th when I received the Surveyor's new map, which first indicated the existence of Limestone on it.

I then informed Mess. Dingee and Bachman that because of the affidavit made I should keep the title in myself, and there was not then nor since any arrangement or agreement of any kind or character between them or their corporation and me respecting this land.

It may be that Mr. Bachman will be leaving the east in time to reach Seattel by November 16th in which case I will try to have him make the connection.

If this is the pivotal point of the case, I presume you will not need either Mr. Evans of Vancouver, who has been with me in all my trips into that country, nor Mr. *Rield* who accompanied us on our first visit to that land.

They of course, could not testify as to the existence of an agreement between the Cement Company and the writer.

I presume that you will not need that double barrelled witness *Synder Reid*, nor Peter Zender who guided us on our first trip, if so, kindly advise me and I will arrange for them.

You may not know that my eighty acres were jumped by Birdwell & Croy. Croy deeded his interest to Birdwell, and the report now is that Birdwell has sold to other parties.

Yours truly.

JLH."

The next is a letter under date of November 2, 1906, from John L. Howard to W. J. Dingee, reading as follows;

“November 2, 1906.

W. J. Dingee, Esq.,
1249 Franklin Street,
City.

Dear Sir:

WASHINGTON PROPERTIES:

PETER ZENDER—160 acres. You now have U. S. Patent to him duly recorded and certificate that the property is free of incumbrance.

WATSON—160 acres. You have U. S. Patent issued to Gus Mansard and [583—192kk] abstract of title through Watson to I. A. Bachman. The \$500 mortgage is probably satisfied by this time, as our attorneys have *wire* me that they had the money and now awaited the release.

D. W. REIDLE—80 acres. This covered four Placer claims. The law requires that \$100 of assessment or developement work must be done each year on each claim until \$500 shall be expended. Upon the presentation of official proof of this fact, you are at liberty to pay the Government at the rate of \$2.50 per acre and obtain a patent.

Three sets of jumpers have filed claims on this land since our purchase. Two of them, I think, did so by inadvertence, because the area was not marked off on the Government map, and they have withdrawn.

The third and last set consists of professionals, who in San Francisco would try for your money

with a gas pipe bludgeon. They claim to have discovered a weakness in some of Reidle's proceedings as to assessment work done within sixty days after filing and they jumped the claims knowing full well that Reidle had sold to us.

Mr. Howard, our lawyer, visited their Ranch recently, and they stood him up for \$2000 blood money, and further than the property should revert to them in a case a cement factory was not erected there.

Reidle gave us a warranty deed, and I wired him to go at once to Bellingham to see our lawyer, and to get these parties out of our way. He is responsible for this amount of money and was to be there November 1st.

With this settled, Dr. Bachman's title will be clear to all his purchases.

In order to hold the Reidle claims I ordered six men to be put to work to clear the land, burning the underbrush, piling the cord wood, and leaving the good timber standing.

This expense is applicable to assessment work, and it must be done sooner or later, to strip the ledge in order to begin the work of opening the quarry.

My own eighty acres are hung up. When on September 17th I visited Seattle to make final proof and payment, I found that the same gang had jumped the land on September 14th, and entered a protest about my obtaining title.

Among the allegations made by them, under oath (none of which are true) the chief is, that I did not take up the land for my own use and benefit.

The burden of proof is upon them, and in the

absence of Dr. Bahman I am the only available witness on this point.

If my evidence in refutation is not sufficient I may be able to get an adjournment until a few days later, when the Doctor [584—19211] could reach Seattle on his way West.

I will leave here P. M. November 12th, and am due in Butler Hotel, Seattle, Nov. 14th P. M. Will be in Seattle November 15th and 16th.

If you can wire me at San Francisco on the day of your arrival in New York, November 12th, I could know before leaving if and when the Doctor can be in Seattle; otherwise you should reach me with a Wire to Seattle, on November 14th.

I think there may come a time in your Northern experience when you may feel like owning another deposit, perhaps for future use, perhaps to deter ambitious investors.

In either event if a few hundred acres of Government land may be had at \$2.50 plus a payment to the finders of the deposit, the investment will be small and meritorious. I shall be on the lookout for such.

It was stated to me that some crude experiments with the Rock on the Reidle claims showed it to yeild a good Lime for building purposes.

In view of the possibility of erecting a few lime kilns, I ordered all useable wood to be saved after cutting, intending it for kiln Fuel.

Think we can get a freight rate of \$1.00 per ton in bulk to Seattle. In summer it may be delivered in bulk at the work.

In wet weather it may be put into empty barrels after its arrival.

I earnestly suggest that the Doctor shall look up the matter of machinery for making single stave barrels as McMillan does. It simply means the cutting of the fir timber into the length of a barrel, barking the bolts, putting them in a hot water tank, then clamping the end of each bolt with iron dogs which slowly revolve and force the log against a stationary knife. The result is a long strip of veneer, of suitable thickness. These are cut in lengths, tied in bundles, and piled under cover to dry, and kept until needed.

On account of the long season of wet weather, in that country I think there will be need of some barrel packages both for cement and lime.

Yours truly.

JLH."

The next is a letter dated January 8, 1907, John L. Howard to W. J. Dingee, reading as follows:

"W. J. Dingee, Esq.,
1249 Franklin Street,
San Francisco, Cal.

Dear Mr. Dingee: I have your note, and your call for money came [585—192mm] suddenly like the proposal to the old maid.

I picked up a few local people in a hurry who had spoken to me, and some others are out of town.

I wrote to a Northern friend (who wanted \$45/\$50,-000) on Friday last, and told him to wire me if he wanted and when he would remit.

It is so very difficult to get about and I am in such a whirl of work, that since seeing you I have not been able to see anyone on this subject.

If work permits I will try tomorrow.

Yours truly.

JLH."

The next is a letter dated January 17th, 1907, from John L. Howard to W. J. Dingee, reading as follows:

"Jan. 17, 1907.

W. J. Dingee, Esq.,
1359 Franklin St.,
City.

Dear Sir: Herewith vouchers paid by Evans, Coleman & Evans:

EXPLANATION:

\$1,000—To D. W. Riedle was authorized by you as one-half of the contribution of \$2,000 to get the professional jumpers of the land, the right to which were bought from Riedle by Dr. Bachman. Riedle paid the other \$1,000.

\$208.55 to C. A. Horst. Realty Agent, who bought the Anderson farm for Dr. Bachman, but the owner refused to pay any Brokerage, and we had to pay him the prevailing five per cent.

The balance of the bills are almost entirely due to labor, in the performance of assessment work to enable us to apply for the U. S. Patent.

This application has now been made, and as there are no adverse claimants, the patent will be granted.

Assessment work requires \$500 per claim; there

were four claims and the only additional cost will be \$2.50 per acre to the government for 80 acres. That will end it.

Yours truly.

JLH."

The next is dated January 28, 1907, from John L. Howard to W. J. Dingee, and reads as follows:

"January 28, 1907.

W. J. Dingee, Esq., [586—192nn]

1249 Franklin Street,

San Francisco, Calif.

Dear Sir:

Do you know of any objection to giving publicity to the starting of Northwestern cement company's plant, and to your acquiring control of the B. B. & B. C. railroad?

Yours truly.

JLH."

The next is under date of January 30, 1907, from John L. Howard to William J. Dingee, and reads as follows:

"January 30, 1907.

W. J. Dingee, Esq.

1249 Franklin St.,

San Francisco, Cal.

Dear Sir: Please pass this on to Dr. Bachman—

EXTRACT FROM E. E. EVANS' LETTER JAN-
UARY 25TH, 1907.

For your guidance, Mr. McNeill telephoned me yesterday afternoon stating that he had received a telegram advising that the Practical Engineer left Montreal on the 23rd inst. for Vancouver, and that

no time would be lost in preparing the necessary estimates and making us an offer as low as they could go. Mr. McNeill states that they mean business and hope that we will be able to come to terms.

With reference to the cutting from the paper which you sent with regard to export duty on power, I had already seen this, but from all I can hear the idea is simply to protect Canada so far as power from Niagara is concerned, and the imposition of the export duty is merely discretionary, and it is not thought for a moment that it will apply in British Columbia.

Yours truly,

JLH."

The next is a letter under date of February 19, 1907, addressed to Mr. John L. Howard and signed by William J. Dingee, reading as follows:

"1240 Franklin St., San Francisco, Cal.

Feb. 19, 1907.

John L. Howard, Esq.

Naniamo, B. C.

My Dear Mr. Howard: I did not realize the other day, when I found you were going on Sunday, that I would not see you again before I return against the east, and I wanted to discuss Slate matters with you.

That enterprise has got to go and I don't believe it can go the [587—19200] way it is hooked up now. There are certain cases where commissions have been paid to encourage its use and probably there is some advertising that could be done that you would not feel warranted in paying for. Consider-

ing all of those things, I have decided to ask Mr. Graham to come back here from the first of March and devote himself exclusively to the sale of slate, and I have made some arrangements in regard to advertising which I think will bring better results.

I will make any adjustment of the matter that is satisfactory to you for the time you have had the sale of the slate but it occurred to me that perhaps it might be fair to both sides if I paid Graham's salary and any other outlay that you have made in regard to the matter while in your hands; as I understand, you have paid for the Slate in full without making any deductions for profit to yourself. Mr. McGary will adjust it with you in my absence and anything in reason that you suggest will meet with my approval. I trust you will appreciate the necessity I feel for making this change.

I have a man here who is considering the proposition of underwriting the entire bond issue of the Northwestern Company taking ten shares for each bond. If he has the entire issue, so that nobody will be selling bonds and giving any more than five shares for each bond, I think he will undertake it, getting his profit out of what he saves from the 10 shares we give him with each bond.

On receipt of this, I wish you would wire me the shape the bonds and stocks are in that you have sold, and whether you would be willing to turn over the bonds that you have to this Syndicate. I am not sure that it will be a go, but I told them that you had \$300,000 and that a few had been sold and they would not undertake it unless they were assured that

the purchasers of the bonds that were sold would not be re-selling them with more than five shares with each bond.

Kindly wire me as to these points on receipt of this letter and also as to whether you would be willing to turn over the remaining bonds coming to you with 10 shares for each bond. They would expect, however, I think, to go up North and work that territory as well as here, so, if you see any rocks ahead in the doing of this, I wish you would include that in the telegram, not the rocks but the ideas.

Mrs. Dingee and I are going East next Thursday, the 28th of February. We expected to get off on Sunday, but the Doctor only got here yesterday and I cannot get away before Thursday.

We are reorganizing the Standard Company. McEnerney is now forming a corporation, known as the Standard Portland Cement Corporation, which will take over the Standard Company and the present stockholders of that company will get two shares of the new Company for every share of the old company. While I am not going to make any flourish of trumpets or announce it from the housetops, we are going to pay 75c on the new stock, beginning not earlier than the middle of April.

Hoping that you have found all of your affairs at the mine in good shape and that you are enjoying good health, I am,

Sincerely yours,

WILLIAM J. DINGEE.

E." [588—192pp]

Mr. BROBECK.—Q. Mr. Howard, can you tell us what Slate Company that reference is made to?

Mr. HOWARD.—The Eureka Slate Company in Placer County, I think it is. We sold the product for him for six months as a favor.

Mr. DUNNE.—The next is a letter under date of February 22, 1907, from John L. Howard to William J. Dingee, reading as follows:

“February 22, 1907.

W. J. Dingee, Esq.,
1249 Franklin St.,
San Francisco, Cal.

Dear Sir: I am just in receipt of your letter Feb. 19th. Arrived Wednesday noon, and will reach Bellingham by the middle of next week.

SLATE BUSINESS:

It is quite agreeable to me that Mr. Graham should be transferred from our office to yours. Since July 1st when he came to us, I have been so much way from home and so driven with accumulating work when there, that it was impossible for me to give that item the amount of personal attention which other matters have claimed, and the slate business had to be left entirely with Graham, who had all the experience and who repeatedly assured me that it was getting all possible attention.

I will have your Statement of outlays made up and sent to Mr. McGary.

NORTHWESTERN CEMENT BONDS:

I have placed 95,000 bonds with investors, not

speculators, and have my word out to various friends that from memory may absorb up to say \$150,000. None of these will be hawked. Your people may have any amount beyond that \$150,000 in so far as I am concerned and also any portion of that \$150,000 that may not be taken. On my way home I intended to bring the bonds to the attention of some friends in the North, but in view of your statement that if the bonds are taken 'en block' the underwriters may wish to work the North; I will have to speak guardedly on the subject.

I note that you are organizing the S. P. Cement Association and will double the stock of present holders, paying 75¢ per share on the total issue from the middle of April. I think you will find that under the assurance of a 9 per cent dividend the increased stock will gradually creep back to par from whatever value point it reaches after its multiplication.

Thank you, I am now rested, and in good health. Mines in good condition and prospects flattering.

Trusting that you and Mrs. Dingee will have an enjoyable trip and a safe return,

Yours sincerely." [589--192qq]

The next is a telegram from William J. Dingee to John L. Howard, under date of February 23, 1907, reading as follows:

"San Francisco, Calif., Feb. 23, 1907.

John L. Howard, Esq.,

Nanaimo.

Doctor says you are the grasshopper. When will

you advise him about power plans, all ready contractors equipment en route. Contractor arrives here Monday, waiting only on you for power information wire this.

WILLIAM J. DINGEE."

The next is a letter from D. C. Norcross to the Northwestern Portland Cement Company, under date of March 13, 1907, reading as follows:

"March 13, 1907.

Northwestern Portland Cement Company,
1249 Franklin Street,
City.

Dear Sir: Enclosing please find check to your order for \$5,000, which is to cover the purchase of five bonds, for which please issue stock as follows:

30 shares in the name of T. R. Stockett, Trustee.

10 " " " " " Thomas Graham.

10 " " " " " Jeannie Hamilton.

If you will kindly have this stock prepared I will call in on Thursday for it.

Yours truly,

DCN."

Secretary.

The next is a letter from John L. Howard to W. J. Dingee under date of March 18, 1907, reading as follows:

"March 18, 1907.

W. J. Dingee, Esq.,
858 Fifth Avenue,
New York City, N. Y.

Dear Mr. Dingee: I have your letter of March 11th.

I have told Mr. Taylor that the needs of the B. B. & B. C. Railroad to meet the demands of the Cement Company, and to make that property attractive, will require the expenditure of \$500,000.

He agrees with me, and has already had a preliminary canter with Rollins & Sons suggesting to him.

1st. A new and larger issue of bonds.

2nd. The reservation of enough to take care of the outstanding bonds. [590—192rr]

3rd. To omit in the new deed of trust certain objectionable features that exist in the old one, and to get a wider latitude.

The road lost \$11,000 in February due to the stormy conditions which greatly reduced earnings and increased operating costs.

The net for eight months ending February is only \$1427.45. I have started Brother Taylor who will keep moving in the new bond matter, and if we succeed in that respect Mr. McEnerney will take up the question relating to stocks and bonds.

Taylor may go east to see D. O. Mills during March.

He thought that in view of the change in the management of the Road without Mills' knowledge, that D. O. Mills should have been given the opportunity to go into the Cement scheme.

I pass this suggestion to you if you care to let the 'icicle' in now.

Northern newspapers indicate that the Northern Pacific were surveying between their line and Kendall. It may only be a reporter's fake. I have written Superintendent Paige to keep me posted.

Balfour's people asked me if you had bought that Railroad. I told them you now controlled it.

Their inquiry and the N. P. R. R. rumors made me think that there may be something in the wind.

The B. B. & B. C. Railroad debt stands now—

Outstanding bonds.....\$659,000.00

Black Diamond Coal Mining

Co..... 118,114.12

D. O. Mills..... 111,885.88

You see that even if the conditions permitted the issue of the remaining bonds there would be only \$111,000 left for betterments after paying the floating debt.

A new bond is imperative.

I am now waiting for a topographical map in order to plan for the Lime kiln at Santa Cruz. Doctor favors the scheme.

POWER FOR KENDALL. I have given the Doctor a letter from that Canadian Company offering it at \$25. Napa pays \$56.

We may do better in rate, but the time for delivery of current will not be sooner than summer, or early fall of next year.

As I surmised the Doctor concluded to gain time by putting in Steam, and then selling to others the power from the plant when we get the current from Canada.

Wet weather conditions here have greatly interfered with building operating in San Francisco.

[591—192ss]

Mr. McGary, who seems to be more careful in statement than some others, promises to definitely

burn Clinker at Santa Cruz on Tuesday next.

I have suggested to the Doctor that inasmuch as the Standard Portland Cement Corporation will ultimately absorb all the plants here, we had better escape the worry, delay and expense of introducing Santa Cruz by putting it out under Standard brand. You will do that finally just as Atlas Company brands all its products as 'Atlas' and it is better.

When you reach Bellingham on your return trip, in case I should be unable to meet you there, please take up with Mr. C. W. Howard the question of Attorney's salary.

He acts for all Taylor's companies, gets \$5000 per year, and this is prorated. He is a capable chap.

I have been using him in connection with the land complications and the question will be merely, whether you will, pay him as he renders service, or retain him at a fixed salary as the other companies do, and call him for anything needed in the way of legal service.

Thank you, I am keeping well and am very busy. Trusting you and Mrs. Dingee are having a good time,

Yours very truly,

JLH."

The next is a letter from John L. Howard to Dr. Bachman, under date of March 22, 1907, reading as follows:

“March 22, 1907.

Dr. I. A. Bachman,
Napa Junction,
California.

Dear Sir: Herewith copy of telegram from H. B. Paige, indicating that by means of an advertisement he has secured a tender to slash and burn the timber on the Kendall Factory site at \$50 per acre, and that the saving of the wood will cost \$1.75 per cord.

I had in mind that the resultant cord wood might be saved and piled in view of the possibility of our needing it for Fuel in case we concluded to put in a Lime Plant at Kendall, but Paige made an intimation that we might get a cheaper contract if the timber were burned as slashed, and that it might be possible to buy cord wood later from farmers at a lower cost than if we undertook to save the timber cleared from the factory site.

I am wiring Paige that you will reply tomorrow, Saturday. I advise your telegraphing him viz.:

‘Let contract for slashing and burning each side of axis line, fifty dollars acre. Don’t save cord wood at present.’

After Mr. Davis gets there he may decide on the wood question. [592—192tt]

When will you send him North, and will he call on me en route?

Yours truly.

JLH.W.”

The next is a letter under date of April 1, 1907, from John L. Howard to W. J. Dingee, reading as follows:

“April 1, 1907.

W. J. Dingee, Esq.,
858 Fifth Avenue,
New York City, N. Y.

Dear Mr. Dingee:

Your letter March 25th came on Saturday while I was at home with an ulcerated tooth, an inflamed throat and ‘that tired feeling’ which seems to appear with the Buttercups in spring.

You will probably have seen Mr. Taylor by this time. Doctor has sent an Engineer North to begin work. We both agreed that the *the* yard tracks at Kendall should be put in at once, and that the Cement company should own within its own boundaries.

I have instructed Mr. Paige, to buy some new rails, put them in his main line where they are most needed, and sell those that he takes up and lays in the Cement Company’s yard to it. This will lighten the cost to the Railroad Company and we must get ready to handle the construction Material. We can finance that expenditure.

Answering your query, my impression is that if we take hold resolutely of the construction of a 5000 barrell Mill at Kendall it will have ‘a strong determining influence’ on others that seem captivated by the success of cement enterprise on this Coast.

I mentioned to you the matter of Attorney’s Howard’s salary because I did not know that the Doctor intended being there with you, but I will now take it up with him.

‘Standard Brand’ as the name for Santa Cruz product seems to have taken well with both you and the Doctor.

(Testimony of John L. Howard.)

The lime kilns for Santa Cruz are already ordered by wire from the east.

The Rollins & Sons at San Francisco don't take kindly to the proposed new Railroad bond issue. Earnings don't look big enough. Taylor was to see their Chicago man.

I am sorry to learn of the accident to Mrs. Dingee. Please convey my wish for speedy recovery from all ill effects of the fall.

Yours very truly.

JLH."

The next is a letter— [593—192uu]

Mr. BROBECK.—Q. I will ask you, Mr. Howard, that Lime Company was the Western Calcium Company, was it not?

Mr. HOWARD.—Yes.

Q. There was also a Santa Cruz Lime Company, was there not?

A. I think there was such a concern as that, a very old one that the Santa Cruz Company had purchased.

Mr. DUNNE.—The next is a letter from John L. Howard to William Dingee, under date of May 15th, 1907, reading as follows:

“May 13th, 1907.

W. J. Dingee, Esq.,
1349 Franklin Street,
City.

Dear Sir: I wired from Bellingham that Engineer Davis' estimates in favor of Contractor Day be promptly paid in accordance with the terms of the contract, copy of which the Doctor has.

Owing to the scarcity and cost of labor Day's contract has proved unprofitable.

You are protected by a bond, but if you side-step the terms of contract by not paying promptly you cannot hold him or his bondsmen, and a new contract will cost the Company more money.

I heard some criticism about the want of promptness in paying these Northern accounts, and attributed it to the fugitive life now being led by the Doctor. Still, in the beginning at least a new concern should keep a good credit.

I suggest that a check for \$500 be sent to C. W. Howard to cover the assessment work for 1907, on the four Riedle claims.

Yours truly.

JLH."

The next is a letter under date of May 13, 1907, from William J. Dingee to The First National Bank of Bellingham, Washington, reading as follows:

"San Francisco, May 13, 1907.

Copy.

The First National Bank,
Bellingham, Wash.

Gentlemen: Would you kindly advise your President, Mr. Purdy, that we have instructed our engineer in charge of the construction of our cement plant near Kendall, to do what banking business the company may have through your institution? [594—192vv]

Mr. John L. Howard has informed us of your kindness towards us in the matter of the acquisition

of the property. The banking business may not prove very profitable yet, but it will, doubtless, later on, but whatever it is we desire your institution to have it.

Yours truly,

(S) WILLIAM J. DINGEE,

President.

NORTHWESTERN PORTLAND CEMENT CO.”

The next is a letter under date of May 13, 1907, from Mr. Howard to Mr. Dingee, reading as follows:

“May 13, 1907.

W. J. Dingee, Esq.,
1249 Franklin Street,
City.

Dear Mr. Dingee: I spent Wednesday night, Thursday and Thursday night at Bellingham with Mess. Taylor, Hyatt, Paide & Howard, discussing water front schemes for the B. B. & B. C. Railroad.

Mr. Haytt's idea is that the B. B. Improvement Company should give the Railroad a free right of way over its tide lands near Sheome Dock and cede to it at its low rental cost such portion beyond as may be necessary for a wharf.

To turn over to it at cost and interest such property as it had bought and held for account of the Railroad Company in Squaticum Creek (\$37,000) and to sell to it such other land as it has owned and that may be needed by the Railroad Company at \$200 per acre (say \$18,000), total \$55,000.

My reply was, that this offer involved little or no

sacrifice on the part of the Improvement Company in view of the improvement and values of its properties should the Railroad Company carry out its plans.

That the tide land right of way would be at best a narrow strip, and that their leasehold from the State beyond that was costing them a mere *normal* rental.

That if they had bought property for the account of the Railroad Company it would be fair to reimburse this cost with interest, but that any property needed by the Railroad Company which the Improvement Company had not paid for, but which in the first instance had been obtained from the Railroad Company, should be freely given without any consideration, and this I thought was the most liberal view which the Railroad Company would consider.

My solution to much of the difficulty and expense was, the extension of a wharf out immediately in front of the mouth of the Squalicum Creek, which would enable the Railroad Company to accommodate all its lumber and cement shipping, and would be equally serviceable in receiving through freight.

Where they want to go with a line will increase the congestion along the narrow water front, and will be attended with difficulties as to franchises from the municipality and the U. S. Government, and with great expense in acquiring property, which latter [595—192ww] has gone skyward in view of reports of the coming of the Union Pacific & Canadian Pacific Railroads. They are all possessed with the idea of acquiring position on the water front, and this is com-

mendable if our Railroad Company was in position to meet the expense, but they overlook the fact that with the increase in business of the port the water point improvements must extend northward, and if we build out from Squalicum we will be merely anticipating this movement by a few years.

That in expenditures for property there is a big difference between our Company, which is struggling to keep afloat, and the Transcontinental Lines that can sell bonds ad libitum.

My Taylor, I think, will fall in with *any* view, but evidently seeks to boost up the liberality of Mr. Hyatt, who has influence with Mr. Cornwall.

I left Mr. Taylor at Bellingham to thresh out details of estimates connected with the discussed needs of the Railroad.

Yours truly.

JLH."

The next is a letter from Mr. Howard to Mr. Dingee, under the same date, May 13, 1907, reading as follows:

"May 13, 1907.

W. J. Dingee, Esq.,
1249 Franklin St.,
City.

Dear Mr. Dingee: The Sour Track leaving the main line of the B. B. & B. C. R. R. crosses the N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Section 22 in order to reach the land of the Northwestern Cement Company.

The Railroad Company has agreed to pay the Owner at the rate of \$25.00 per acre for the Right of Way, and the balance may be bought at same rate.

In as much as houses will naturally begin to cluster near the Railroad Station, do you consider it advisable that the Cement Company should purchase these forty acres?

The arrangement with the Doctor is that the Cement Company should own the Railroad Tracks from the main line into the factory. It should therefore own the Right of Way, and I would suggest that it purchase the remainder of the forty acres.

A new station will have to be created at this point, and as its name will enter into the literature to be issued by the Cement Company, the latter should have some voice in the matter.

Have you any choice? If not, I would suggest 'Devon,' a celebrated name in the South of England, and repeated near Philadelphia.

Yours truly.

JLH." [596—192xx]

The next is a letter under date of May 13, 1907, addressed to Mr. Dingee, from John L. Howard, reading as follows:

"May 13, 1907.

W. J. Dingee, Esq.,
1249 Franklin Street,
City.

Copy for Mr. C. W. Howard.

Dear Sir: At Bellingham I was informed that Mr. Davis, the Local Engineer had received instructions to do his Banking business through the Bellingham National Bank.

In view of the valuable and necessary service rendered us by Mr. Purdy of the First National Bank,

and of the strong personal influence he exercises in that community, I promised him last fall to exert myself in securing for his Bank whatever business we might be doing in that place.

He has earned it, and his Institution is by far the strongest in Northwestern Washington.

The other bank is doubtless good enough, but it has not the resources nor the power of the First National.

Is there any reason why Mr. Purdy should not have the business?

Yours truly.

JLH."

The next is letter from John L. Howard to C. W. Howard, under date of May 14, 1907, reading as follows:

"May 14, 1907.

C. W. Howard, Esq.,
c/o Mess. Newman & Howard,
Bellingham, Wash.

Dear Sir: Herewith Northwestern Portland Cement Company's check to your order for \$500 to cover expenses connected with assessment work in the Riedle claims.

Later on please forward to the Cement Company the vouchers in connection with the expenditures.

At my request Mr. Dingee has written Mr. Purdy about the banking business.

Yours truly.

JLH."

The next is a letter under date of May 14, 1907, from John L. Howard to C. W. Howard, reading as follows: [597—192yy]

“May 14, 1907.

C. W. Howard, Esq.,

C/o Mess. Newman & Howard,

Bellingham, Washington.

Dear Sir: Mr. Randolph has advised me by letter received today of the decision of the U. S. General Land Office in my favor, and against the Birdwell protest. He has sent a copy to you.

I infer there is time given to the other parties in which to appeal from this decision to the Secretary of the Interior.

Mr. Randolph thinks in view of the sweeping character of this opinion the other parties will be foolish to take an appeal, but until that time expires it may be economy not to spend any money on those claims. If they do not appeal then there is no need of further assessment work; if they do appeal, there is plenty of time left in which to do it.

Tell Mr. Purdy I have fixed that Banking business and I will send you at once \$500 from the Northwestern Portland Cement Company to cover the assessment work on the Riedle claims.

No copy of this letter has been kept and you may destroy this.

Yours truly.”

JLH.”

The next is a letter from John L. Howard to W. J. Dingee, dated May 14, 1907, reading as follows:

“W. J. Dingee, Esq.,

1249 Franklin Street,

City.

Dear Sir: Will you kindly pass work to the Doctor

not to route any construction material until he hears further from us.

We have applied to the Great Northern, Northern Pacific and Canadian Pacific to make 'Devon' the factory site a common point.

That will keep up the question of the proportion of through rate to which our road will be entitled.

Mr. Paige has this item in hand, and we want to route by that line which will give the most revenue to us.

I am apt to hear from Mr. Paige at any time.

Yours truly.

JLH."

The next is a letter under date of May 20, 1907, from John L. Howard to Mr. Dingee, which reads as follows:

"May 20, 1907.

W. J. Dingee,

1249 Frankline Street,

San Francisco.

For Mr. Bachman.

Dear Sir: Herewith copy of a letter from Ernest Evans. It would [598—192zz] seem that Stone & Webster, who have developed power at Nooksack Falls and who were so very indefinite and unsatisfactory in our negotiations last summer, have in some way learned that we were in treaty with the Vancouver Co. and now want to talk business.

To them it no longer seems like 'hot air' as between

the two companies we may be able to beat the \$25.00 rate.

Yours truly,

_____, President.

JLH/K.”

The next is a letter from J. H. Howard to W. J. Dingee, under date of June 4, 1907, reading as follows:

“June 4, 1907.

W. J. Dingee, Esq.,
1249 Franklin St.,
San Francisco.

Dear Sir:

For attention Dr. Bachman.

Routing Construction Material for Northwestern Cement Co. The Canadian Pacific will make Devon a terminal point.

The Great Northern and Northern Pacific have not yet given a favorable answer, but one is expected during the coming week.

Mr. Paige asks that 25 percent of the material be given to the Canadian Pacific, and because of his business relations with the Chicago & Northwestern Railroad it would be well to favor this line with any of the material that originates at Milwaukee or any point east of St. Paul.

Please be advised that Mr. Paige accepts ‘Devon’ as the name of the new station at the Cement Works.

Yours truly,

_____,
Pres’t.

JLH./K.”

The next is a letter from Mr. Davis addressed to Mr. William J. Dingee—it is signed the “Northwestern Portland Cement Co. by Fred Davis”—and on the face of it in blue pencil is something which I interpret to mean O. K. Howard.

Mr. HOWARD.—Yes. I wrote that.

Mr. DUNNE.—This reads as follows: [599—193]

“Kendall, Wash., June 26, 1907.

Mr. William J. Dingee,

1249 Franklin St.,

San Francisco, Cal.

Dear Sir: I beg to acknowledge receipt of your letter of the 22d inst. and note instructions contained therein with reference to assessment work to be done on the upper claims. Mr. Howard’s instructions will be followed and the work executed where it will be most advantageous to the company.

Yours very truly,

NORTHWESTERN PORTLAND CEMENT
CO.

(In red rubber stamp.)

FRED DAVIS.

(In ink.)

“O. K. H.” (In blue pencil.)

Mr. HOWARD.—I think the “Howard” there means “C. W. Howard.” C. W. Howard was the lawyer who was giving the instructions what to do. I think that refers to him.

Mr. DUNNE.—So as to make this clear then, Mr. Howard, the Mr. Howard referred to in the body of the latter was the attorney at Bellingham?

Mr. HOWARD.—Yes.

Mr. DUNNE.—But the “O. K. H.”—that was yours?

Mr. HOWARD.—Yes. Dingee evidently sent me that for my information.

Mr. DUNNE.—The next is a letter from *John L. Howard* to *C. W. Howard*, under date of June 29, 1907, and reads *ad follows*:

“June 29, 1907.

Mr. John L. Howard,
87 Vernon St.,
Oakland, Cal.

Dear Sir: I have your favor of the 22nd inst. Yesterday received check from the Northwestern Portland Cement Co. for \$323.04, in payment of bill of April 2, for which please accept our thanks. We also acknowledge receipt to the company.

I enclose copy of letter under date of June 22nd, received from Mr. Morrison, in which you will note that he apparently adheres to the idea of having patent taken in the name of Dr. Bachman. This [600—193a] is somewhat contrary to the suggestions contained in your letter of the 22nd.

In view of the fact that the money is here available to perform assessment work on the east half of the southwest quarter of Section 23, Township 40, North, Range 5 East, unless otherwise directed, I shall have Mr. Zender proceed to perform the necessary assessment work for this year having, as one of his employes, Mr. *davis*, who can make suggestions as to the nature of the work. After this work has been

performed proof will be filed in the names of Bachman and Purdy on their respective claims. By that time the matter of the appeal on the west half of the same quarter may be determined. If no appeal is taken it may then be deemed advisable to have the company purchase the interest of Bachman and Purdy in the east half. I would not recommend filing any deed to the Company for the east half until that question has been disposed of. While there is absolutely no connection between the two, it may leave ground for suspicion that there is. I think you are in error in stating that the claims in question are included in the mortgage. It is my recollection that they are not specifically described in the mortgage. Of course they would be included as after-acquired property, should the company ever acquire the same.

I am sending carbon copy of this letter to Mr. Morrison and unless I receive directions to the contrary, will carry out the course indicated after I have had a reasonable time in which to hear from you.

Yours truly,

C. W. HOWARD.

CWH/J.”

Below there is certain writing, which I assume to be in the handwriting of Mr. Dingee. It is certain pencil memorandum. I will show it to you, Mr. Howard, to see if you can identify the handwriting.

Mr. HOWARD.—That is Dingee’s writing.

Mr. DUNNE.—The language written at the bottom of this letter, in pencil in Mr. Dingee’s handwriting, is as follows:

I assume you will while there confer with Mr. Howard and do what you think best which will meet with the approval of

W. J. D."

The next is a letter dated, September 17, 1907, from John L. Howard, to Mr. C. W. Howard, reading as follows:

"Sept. 17, 1907.

Nr. C. W. Howard,
c/o Newman & Howard,
Bellingham, Washington.

Dear Sir: To yours of Sept. 13th:

The Northwestern Portland Cement Company paid the money [601—193b] to cover Mr. Hyatt's expenses on the Kendall claims.

You have taken a deed from Mr. Hyatt to him, and in order to keep matters straight I have had Mr. Schmitt execute a deed to Northwestern Portland Cement Company, which will be held by it without recording until the atmosphere clears.

I cannot take up the matter of deeding my interest to him until the return of Mr. Dingee from New York, about the middle of October.

I will have Mr. Scmitt send to you his Power of Attorney, under which you may instruct Mr. Davis to do what development work he desires, as of course such work may, if necessity requires, be counted as assessment work on these claims.

I expect to clean up this tangle during October. You ask me to return to you the Land Office Certificate, which at your request I sent to Mr. Randolph. I enclose it with this, and also Mr. Randolph's letter

of Sept. 13th. Please return when you have finished.

Yours truly."

The next is a letter under date of Sept. 4, 1907, from Mr. John L. Howard to W. J. Dingee, reading as follows:

"Sept. 4, 1907.

W. J. Dingee, Esq.,

Crocker Building, City.

Dear Sir:

Some friends who invested in bonds of Northwestern Cement Company are writing and speaking to me regarding the present status of that concern.

I can only tell them that on my last visit North I saw the work in progress, and the factory site was expected to be by October 1st, and that I learned of the plans being forwarded to Dr. Bachman for approval within the last two weeks.

That you had no advices regarding the ordering of the equipment, for at our last conversation you said that the Doctor was not answering your letters.

These friends inquire whether all the bonds have been subscribed, and whether the subscriptions have been paid.

Whether the construction material and machinery equipment have been ordered, and if so, when active construction operations will begin.

If it has not been ordered, what is the intention in that regard? In view of their investment and of the delay in active Operations, these questions are quite natural and proper.

Will you please drop me a line that I may send it

North to one who has put \$50,000 in the concern.

Yours truly.

JLH." [602—193c]

The next is a letter under date of Sept. 5, 1907, from Mr. William J. Dingee to Mr. John L. Howard, reading as follows:

“San Francisco, Sept. 5, 1907.

John L. Howard, Esq.,

Western Bldg. Material Co.,

City.

Dear Mr. Howard: In reply to your favor of the 4th inst. relative to the Northwestern Portland Cement Company, will say that the plans are now completed and have been sent to Dr. Bachman at ~~Nasarth~~ Nazareth, Pa. I am advised by him that he is now receiving bids for the machinery and has already let the contract to the Allis-Chalmers Co. for the Ball and Tube Mills.

I start east on next Sunday and will then take up the matter with Dr. Bachman of the letting of the contract for the foundations of the buildings, so that the foundations will be ready to receive the machinery as it arrives.

The people who have bought stock and bonds of this company need have no misgivings as to our good faith in the matter. That plant will be built but on account of the extraordinary money stringency and the slacking up of orders, it has not been pushed as rapidly as it otherwise would have been.

Sincerely yours,

WILLIAM J. DINGEE.

E.”

(Testimony of John L. Howard.)

The next is a letter from John L. Howard to Mr. C. W. Howard, under date of October 16th, 1907, reading as follows:

“Mr. C. W. Howard.

c/o Mess. Newman & Howard,
Bellingham, Washington.

Dear Sir: I reached home today and am sorry that you were absent from Bellingham during my short visit.

BACHMAN DEED: I will have that looked up and signed and forwarded to you.

ASSESSMENT WORK ON RIEDLE CLAIMS:
I will at an early date see the ‘Crowned Heads’ here and have them send North such instructions as will make the development work conform to the general plan of quarry operations.

Yours truly.

JLH.”

Q. Who do you refer to as the “Crowned Heads”?

Mr. HOWARD.—Dingee and Bachman, I suppose. That was a facetious term I had for them.

Mr. DUNNE.—The next letter is from John L. Howard to W. J. Dingee, under date of December 3, 1907, reading as follows: [603—193d]

“December 3, 1907.

W. J. Dingee, Esq.,
Crocker Bldg.,
City.

Dear Sir: Many bond holders of the Northwestern Portland Cement Company have come to me regard-

ing the non-payment of the interest on their coupon at November 1st.

Of course they recognize the holiday feature, but they argue that if the entire amount of payments have not been used in construction there should have been money to meet the bond interest.

Can't you arrange to pay these coupons and stop this kind of criticism?

Yours truly.

JLH."

The next is a letter dated December 4, 1907, from Mr. Howard to Dr. Bachman, reading as follows:

"December 4, 1907.

Dr. I. A. Bachman,
Crocker Building,
City.

Dear Sir: Regarding Cement rate on B. B. & B. C. Railroad, I understood in the beginning that as the Northwestern Cement Company was in position to figure on its business, the parties in control of the Railroad were to agree to a long term freight contract that would yeild some profit to the road, and at same time not be so low as to be unattractive to a future buyer of the Railroad property, and that the contract should be so drawn that the future owner of the Railroad could not side step.

The matter involves the fixing of rates, viz.:

1. Kendall to Sumas—the connecting point of the Northern Pacific and Canadian Pacific.

2. Kendall to Bellingham—the connecting point of the Great Northern, and with vessels, and this rate

should include the wharfage charge on water shipments.

Mr. Paige's ideas were higher than mine. He thought 25 cents to Sumas and 50 cents to Bellingham.

My idea in figuring for the Cement Company was a switching charge of \$2.50 per car each way—Sumas to Kendall—and one cent per ton per mile to Bellingham.

It may be better not to have a contract with the B. B. & B. C. Railroad if there is the hope of sale to the C. P. R. R., because in the negotiations of sale quite as favorable terms, or more so, may be exacted.

For distribution of cement over the widest possible area, you need the Great Northern and N. P. Connection, but if one of the main [604—193e] should own the B. B. & B. C. R. R. you will get a better rate over that line than though it had paid part of its rate to the Bellingham Bay road.

I mean that if the Great Northern or N. P. R. R. owned the Bellingham Bay Railroad, you could get as good a rate from Kendall to Seattle as they would give from either Sumas or Bellingham.

Unless the C. P. R. R. intends going to Seattle, it will not be of the same service as either of the other lines, but I think it intends going there, because I learned that the old contract between the C. P. R. R. and N. P. R. R. for the interchange of business at Sumas will shortly expire, and this will probably not be renewed because J. J. Hill, who controls the policy of the N. P. R. R. is now engaged in a great

struggle with the Canadian line.

Yours truly.

JLH.”

The next is a letter from John L. Howard to Mr. C. W. Howard, under date of December 21, 1907, and reading as follows:

“December 21, 1907.

Mr. C. W. Howard,
Care Mess. Newman & Howard,
Bellingham, Washington.

Dear Sir:

I am pained and mortified to learn from your letter of December 17th that Mr. Dingee has not sent you, as he promised, the check to cancel the Mouso account.

When he was last in my office he said he would do so, and I think I wrote you to that effect.

I will at once take the matter up with him again.

Yours truly.

JLH.”

The next is a letter written by Mr. John L. Howard, to Mr. C. W. Howard, under date of December 23, 1907, reading as follows:

“December 23, 1907.

C. W. Howard, Esq.,
Care Mess. Newman & Howard,
Bellingham, Wash.

Dear Sir: Under date of December 21st. Mr. Dingee writes me that he has sent you a check for \$500 and of this I am glad.

He asks my advice about the caretaker and I wrote

(Testimony of John L. Howard.)

him that I would go to Nanaimo in the early days of January, and, after seeing you on my way home, would then advise him.

Yours truly. [605—193f]

JLH.”

Q. “Caretaker” for what, Mr. Howard?

Mr. HOWARD.—I don’t remember that; I don’t recall that.

Mr. BROBECK.—That was about the time of the abandonment of the construction work, was it not?

Mr. HOWARD.—No, it was earlier than the abandonment.

Mr. DUNNE.—The next is a letter under date of January 10, 1908, from D. C. Norcross to Thomas R. Stockett, reading as follows:

“Jan. 10, 1908.

Mr. Thomas R. Stockett,

Nanaimo, British Columbia.

Dear Sir: Enclosed is a deposit tag for \$125.00
The Cement Company paid the Coupons yesterday.

Yours truly,

Secy.

D. C. N.”

Mr. HOWARD.—Mr. Davis did not leave Kendall until August, 1908. This letter is dated in December, 1907, about the caretaker. I don’t recall it—oh, yes, yes, I know what it means now; he was a caretaker to watch the Reidle claims up on top of the hill; yes, I remember it now.

Mr. DUNNE.—The next is a letter from Mr. How-

(Testimony of John L. Howard.)

ard to Mr. Dingee, dated February 12, 1908, reading as follows:

“February 12, 1908.

W. J. Dingee, Esq.,
Crocker Building,
City.

Dear Sir: Agreeable to my promise of Saturday last a meeting of our Directors was held and the substance of our last interview together with all the facts, were fairly laid before them.

After a full discussion they expressed a preference for a mutual cancellation of the contract, as was agreed to by Dr. Bachman on January 27th, and again when he came to our office with Mr. McEnerney on the following day.

The date was left optional with him, but the intention was to give you ample time to organize a Sales Department, and meantime our efforts in behalf of your companies will *continue* as usual.

Yours truly,

Presd't.

Jlh.” [606—193g]

The next is a letter from J. L. Howard to—

Q. Mr. Howard, the contract referred to here was the Sales Agency Contract which has been referred to in the course of the testimony?

Mr. HOWARD.—Yes, the Sales Agency Contract.

Mr. DUNNE.—The next is a letter dated February 24, 1908, from John L. Howard to E. E. Evans, reading as follows:

“February 24, 1908.

E. E. Evans, Esq.,

Vancouver, British Columbia.

Dear Mr. Evans: I have yours of 18th February. Wenzelburger is said to be preparing his report. I am glad to learn of Percy's convalescence. Please convey my congratulations to him.

Regarding our connection with the Cement Companies here, I enclose copy of my last letter to them.

We had a meeting of Directors and one of them (our attorney) advised us that the contract being a mutual one, could not be abrogated merely at our wish, although that was our unanimous desire.

This letter was prepared in view of that advice, and it brought Mr. Dingee to the front for the first time, who admitted their error in methods, expressed regret for what had passed, promised better methods to come, and conceded an increase in our compensation.

As he would not listen to a separation, there was nothing left but a continuance on our part.

On Saturday it was suddenly decided that I should make a hurried run to New York. If you come to San Francisco while I am gone I trust you will be here at the date of my return.

Yours truly.

JLH.”

The next is a letter from Mr. Howard to Mr. Dingee under date of March 27th, 1908, as follows:

“March 27th, 1908.

W. J. Dingee, Esq.,
San Francisco, Cal.

Dear Mr. Dingee: Referring to our interview of yesterday A. M. I have seen several of the Northwestern Cement Co. bondholders.

Told them that upon the surrender of their bonds with the 100% bonus stock you were willing to give the one year notes of Santa Cruz Portland Cement Co. or Standard Portland Cement Corporation, bearing interest at 6% payable semi-monthly, as is the [607—193h] The case with the bonds they hold.

They then asked—

1—Have either of these two companies the right under their articles of Incorporation to purchase and to hold the stock and Bonds of other corporation?

I told them I felt sure that your articles were drawn with broad enough powers to enable them to do this, but that you could satisfy them on this point.

2—Would you furnish copy of the resolution of the Board authorizing the purchase of the bonds?

I said that I thought there would be no objection to that.

3—Would you endorse the notes of the company that you purchased?

I said that I had not raised that point and only you could answer.

My belief is that they would prefer the Standard Company's notes.

Yours truly,
President.

JLH/G.”

The next is a letter written by Mr. John Howard, under date of March 28, 1908; it seems to be a circular letter. It reads as follows:

“S. V. Smith.

G. W. Spencer.

E. E. Evans.

D. M. McKay.

Thomas R. Stockett.

March 28, 1906.

Dear Sir: After conference with some of the subscribers of bonds of the Northwestern Portland Cement Company, I have arranged that the Standard Cement Corporation will take up the bonds that were subscribed for through the writer, and that Corporation will issue in payment its notes for the face value of the bonds, payable on or before one year with interest at six per cent payable semiannually.

Will you, therefore, please send me your bonds and all the shares, and I will give you receipts therefor, until I deliver you the notes as stated.

The Standard Portland Cement Corporation has authority by its Articles of Incorporation to buy and own securities in other corporations

Its Board of Directors will authorize this step, and I shall be furnished with a certified copy of the authority to purchase. Mr. W. J. Dingee as President will endorse these notes.

Yours truly.” [608—193i]

The next is a letter written by John L. Howard to Thomas R. Stockett, dated March 28, 1908, reading as follows:

“Copy.

March 28, 1908.

Mr. Thomas R. Stockett,
Nanaimo, B. C.

Dear Sir: After conference with some of the subscribers of bonds of the Northwestern Portland Cement Company, I have arranged that the Standard Cement Corporation will take up the bonds that were subscribed for through the writer, and that Corporation will issue in payment its notes for the face value of the bonds, payable on or before one year with interest at six per cent payable semi-annually.

Will you, therefore, please send me your bonds and all the shares, and I will give you receipt therefor, until I deliver you the note as stated.

The Standard Portland Cement Corporation has authority by its Articles of Incorporation to buy and own securities in other corporations.

Its Board of Directors will authorize this step, and I shall be furnished with a certified copy of the authority to purchase.

Mr. W. J. Dingee, as President, will endorse these notes.

Yours truly,
(Signed) JOHN L. HOWARD.

J.L.H.”

The next is a letter from Mr. Thomas R. Stockett to Mr. John L. Howard, under date of April 4, 1908, reading as follows:

“April 4, 1908.

Mr. John L. Howard,
San Francisco, Cal.

Dear Sir: In accordance with your letter of March 28th respecting Northwestern Portland Cement Company: I am sending herewith under cover of registered mail the following:

T. R. STOCKETT, TRUSTEE: Bonds #215,
#214 & #215; also Stock Certificate #125.

THOS. GRAHAM: Bond #216; and Stock Certificate #126.

A. S. Hamilton: Bond #127; and Stock Certificate #127.

The bonds will have coupons due May 1st, attached, and all Certificates have been endorsed in Blank on the back.

When the matter has been adjudged as stated by you, kindly send the notes in the names of each party. I presume that coupons due May 1st, will either be paid or added to the face of the notes. Each one of us thank you for your interest in our behalf in this matter.

Yours respectfully,
THOS. R. STOCKETT.” [609—193j]

The next is a letter from J. L. Howard to Mr. W. J. Dingee, under date of April 9, 1908, reading as follows:

“April 9, 1908.

W. J. Dingee, Esq.,
Crocker Building,
City.

Dear Sir: Referring to our recent conversation

about the Northwestern Bonds. I enclose forms of Resolution and note. Please tell me if the form of note is acceptable, and if the Resolution is O. K. will you kindly have it passed and send me certified copy.

I will then prepare note to accompany each batch of securities.

Yours truly.

JLH.”

The next is a letter from John L. Howard to Thomas R. Stockett, dated April 19, 1908, and reading as follows:

“April 10, 1908.

Thomas R. Stockett, Esq.,

Nanaimo, British Columbia.

Dear Sir: This is to acknowledge receipt of your letter of April 4th enclosing securities with North Western Portland Cement Company, which I find as enumerated in your letter.

These I hold subject to my letter of March 28th.

Yours truly.

JLH.”

The next is a letter from John L. Howard to Mr. Thomas R. Stockett, dated April 7, 1908, reading as follows:

“April 7, 1908.

Mr. Thomas R. Stockett,

Nanaimo, British Columbia.

Dear Sir: The prospects for the early construction of the Northwestern Cement Company seems now so remote, that, after a consultation with Ernest Evans,

and others interested, I saw the President of the Standard Portland Cement Corporation, who has agreed to have that Corporation buy those bonds, and give in exchange the Standard Company's notes endorsed by him, payable in one year and bearing 6% interest payable semiannually.

Our friends here have consented to this arrangement, and under the guidance of Mr. Sidney V. Smith I will close the transaction before leaving for the East.

If you will promptly send me the bonds and shares held by you and your friends I will attend to the matter as outlined. [610—193k]

It is felt that the notes referred to will be better than the bonds.

Yours truly.

JLH."

The next is a letter from Evans, Coleman & Evans, to D. C. Norcross, dated at Vancouver, British Columbia, May 4th, 1908, reading as follows:

"Vancouver, B. C., May 4th, 1908. H.

D. C. Norcross, Esq.,
 The Western Building Material Co.
 430 California St.,
 San Francisco.

Dear Sir: We have to acknowledge receipt of your favour of 29th ult. and as requested, now beg to enclose cheque \$56.25 our proportion of the charge made by Mr. Wenzelburger in connection with the investigation of the Northwestern Portland Cement Company's affairs. Kindly acknowledge receipt,

and oblige, We have not yet received the Standard Portland Cement Company notes, in exchange for the bonds as arranged, and shall be glad to know the reason of the delay.

Yours faithfully,
EVANS, COLEMAN & EVANS.

E.E.E.”

The next is a letter from Mr. Norcross to Mr. Thomas R. Stockett, under date of May 9th, 1908, reading as follows:

“May 9, 1908.

Mr. Thomas R. Stockett,
Nanaimo, British Columbia.

Dear Sir: Enclosed please find the following notes of the Standard Portland Cement Corporation, which are issued in payment of bonds and stock of the Northwestern Portland Cement Company which were received with your letter of April 4th:

Thos. R. Stockett, Trustee	\$3,000
Thomas Graham	1,000
A. S. Hamilton	1,000

I also enclose deposit tag for \$150, being the amount collected for five coupons out from these bonds.

Yours truly,
Secretary.

DCN.”

The next is a letter written by Mr. Thomas R. Stockett to Mr. D. C. Norcross, and dated May 21, 1908, reading as follows: [611—1931]

“May 21, 1908.

File 14 B.

Mr. D. Norcross,

Se., Western Fuel Co.

San Francisco, Cal.

Dear Sir: Owing to the strenuous life during President Howard's visit I have been delayed in acknowledging your letter of May 9th enclosing Notes of the Standard Portland Cement Corporation and Deposit Slip for \$150, being interest due May 1st on Bonds of the Northwestern Cement Co. I think you very much for your attention to this matter.

Yours very truly,

THOS. R. STOCKETT,

Manager.”

The next is a letter from Mr. D. C. Norcross to Mr. W. J. Dingee, dated May 28, 1908, reading as follows:

“May 28, 1908.

W. J. Dingee, Esq.

Crocker Building.

City.

Dear Sir: Will you kindly acknowledge receipt of my letter of May 14th enclosing 8900 shares of Northwestern Portland Cement Company which were endorsed to your order.

Yours truly,

DC.N”

The next is a letter dated May 28, 1908, from D. C. Norcross to W. J. Dingee, reading as follows:

(Testimony of John L. Howard.)

“May 28 1908.

W. J. Dingee, Esq.,
Crocker Building,
City.

Dear Sir: among the certificates of the Northwestern Portland Cement Company sent you were two which the stockholders requested should be taken out of their names to avoid Stockholders Liability

We considered the endorsement on the back sufficient but the attorney for one of the stockholders (Mr. George W. Spencer, deceased) has requested that we kindly have this done to avoid any complications.

All these shares were all transferred to your order, will you kindly have the necessary transfer made, advising me when this is done that I may communicate with those interested.

Yours truly,

DCN.”

Below that, in pencil, are certain writings, I will ask you Mr. [612—193m] Howard if the first of those memoranda is in your handwriting?

Mr. HOWARD.—The first is in mine and the second is in the writing of Mr. Norcross.

Mr. DUNNE.—The first reads as follows: “D C N. This winds up that business does it not?”

The second of these memoranda, in the handwriting of Mr. Norcross, reads as follows:

“No, I have ten bonds of Warners to deliver. Waiting Dr. Bachman’s return from east.”

Attached to this letter is a letter under date of

(Testimony of John L. Howard.)

June 5, 1908, from L. F. Young, Secretary of the Northwestern Portland Cement Company, to John L. Howard reading as follows:

“San Francisco, Cal. June 5, 1908.

John L. Howard, Esq.,

c/o Western Building Material Co.,

430 California St.

City.

Dear Sir: Replying to your letter of the 23rd inst. I will say that the certificates of stock you refer to were transferred on the 25th day of May, 1908; that is, all the certificates that were brought up here to that time were transferred on that date, and I presume that the two you refer to were included therein.

Yours truly,

L. F. YOUNG, (In ink)

Secretary.

NORTHWESTERN PORTLAND CEMENT CO.

(In Ink.)

DICT. LFY/GD.”

And below that, in Mr. Howard's handwriting, I believe—

Mr. HOWARD.—No, that is Mr. Norcross's writing.

Mr. DUNNE.—Below that, in Mr. Norcross's writing, is the following memorandum:

“Mr. Howard: Notified all interested. D. C. N. 6/6/”

The next is a letter from Vancouver, B. C. under

date of 30th May, 1908, addressed to D. C. Norcross, and signed by Evans, Coleman & Evans, reading as follows:

“Vancouver, B. C., 30th May, 1908. H. [613—193n]

D. C. Norcross, Esq.,
Western Fuel Company,
San Francisco.

Dear Sir: Enclosed we beg to hand 5 bonds of \$1000, each number 163 to 167 inclusive, also certificate No. 177 for 50 shares in the Northwestern Portland Cement Co. belonging to Mr. E. H. Warner. We shall be much obliged if you will kindly collect the interest due on the bonds on first instant, and hand them over, together with the share certificate to the Standard Portland Cement Corporation in exchange for their promissory note, in favour of Mr. E. H. Warner, endorsed by Messrs. Dingee and Bachman, as arranged, and send same to us.

Our friend Mr. E. H. Warner, who purchased some shares in the Central Brick Co., through us, over two years ago, has written asking us for information as to how this Company is progressing, and as we have never seen a balance-sheet or a copy of the profit and loss statement, we shall be exceedingly obliged if you will kindly send us copies of the latest, for our guidance.

Yours faithfully,

EVANS, COLEMAN & EVANS.

E. E. E

Register.”

(Testimony of John L. Howard.)

Mr. BROBECK.—That Brick Company had nothing to do with Mr. Dingee, did it, Mr. Howard?

Mr. HOWARD.—No.

Mr. OLNEY.—I presume we may stipulate at this time that these bonds of Mr. Warner's were never finally surrendered.

Mr. BROBECK.—That is true; that is, the notes were never finally surrendered.

Mr. OLNEY.—The bonds were never surrendered, I think.

Mr. BROBECK.—The bonds were tendered but the notes were never given.

Mr. OLNEY.—Well, all right.

Mr. DUNNE.—The next is a letter from D. C. Norcross to W. J. Dingee, reading as follows:

“July 18, 1908.

Copy to W. H. Cole.
W. J. Dingee, Esq.,
Crocker Building,
City.

Dear Sir: Enclosed are two forms of notes to be signed in connection [614—1930] with ten bonds of the Northwestern Portland Cement Company, which I will hand you on execution of these notes.

Yours truly.”

The next is a letter from Mr. John L. Howard to W. J. Dingee, dated December 10, 1908, reading as follows:

“December 10, 1908.

W. J. Dingee, Esq.,
Mills Building,
City.

Dear Sir: Referring to my letter to you of November 24th (copy of which I enclose) Mr. Evans of Vancouver writes that he is shortly to leave for England, and in behalf of himself and of some friends there, whom he will see, all of whom bought Northwestern Cement Company's bonds, he wishes to know the result of the negotiations with you respecting your proposed guarantee of the Standard Portland Cement Corporation notes that were taken by them in exchange for the bonds.

I have not heard from you as promised, and think that unless I can send them some definite word, he will before leaving, press through other means for the payment by the Cement Company of the overdue interest.

Please let me know what, if anything, I can say to him.

Yours truly.

JLH.”

The next is a letter from Mr. Thomas R. Stockett to Mr. John L. Howard under date of December 4, 1908, reading as follows:

“File 14 C.

December 4, 1908.

Personal.

Mr. John L. Howard,
San Francisco, Calif.

Dear Mr. Howard:

I have received your letter of Nov. 26th from Oakland in reference to Dingee and Standard Portland Cement Company's affairs:

I regret very much the turn affairs have taken and that they have caused you so much anxiety: Let us hope that in the end conditions will be better under the new owners. I know you are doing everything possible to protect the company's interests and also the interests of your friends, who went in through your recommendation. Personally I am entirely satisfied to let my interest rest in your hands, as are also Graham and Hamilton. For that purpose I am sending herewith a Power of Attorney in your favor from each one of us, and also each of our notes.

Yours respectfully,

THOS. R. STOCKETT.” [615—193p]

The next is a letter from J. L. Howard to Thomas R. Stockett, under date of December 11, 1908, reading as follows:

“December 11, 1908.

Thomas R. Stockett, Esq.,
Nanaimo, British Columbia.

Dear Sir: I beg to acknowledge receipt of yours of December 4th enclosing Power of Attorney for yourself, Thomas Graham and A. S. Hamilton, in regard

to Standard Portland Cement Company's notes, also three notes.

Yours truly.

JLH."

The next is a letter from Mr. John L. Howard to Mr. C. W. Howard, under date of December 8, 1908, reading as follows:

"December 8, 1908.

Mr. C. W. Howard,
c/o Mess. Newman & Howard,
Bellingham, Washington.

Dear Mr. Howard:

I have your letter of December 3rd. In May last when it appeared that Mr. Dingee and Associates had made at least a temporary abandonment of the Northwestern Portland Cement scheme, I arranged with him, as I wrote you, to take back the bonds and shares that had been placed through this office, and to issue therefor the notes of the Standard Portland Cement Corporation endorsed by himself and Dr. Bachman.

At that time I sold him the receipt that I held for the Timber and Stone Claim and agreed that when the patent came I would make a formal deed. I took a similar note for the amount.

But prior to that time there had been no discussion of any kind or character between the writer and any other person or corporation with the view of my turning over or selling that piece of land.

It would now appear from your letter that the decision of the U. S. Supreme Court voids the rule of the U. S. Land Office, and that the expressed or im-

plied agreement of sale must exist at the time of the application in order to invalidate the transaction.

But I am entirely clear of any agreement, either expressed or implied, until May, 1908, when I voluntarily offered and sold my interest, because under the circumstances I did not want to hold it any longer.

I have not received the patent to the land, and I assumed that it was held pending the report as to whether or not it was valuable for coal. I know that it is not.

But I do not anticipate unfavorable action, and have written to as Washington friend asking him to visit the Land Office and quietly ascertain the status of my patent application.

Now as I have parted with my interest to Mr. Dingee, all that [616—193q] : I can do in the matter (and I will do that at once) is to lay the facts before Mr. Dingee and ask him whether he wants to take chances on my application, or whether he wants to prevent the possibility of further trouble by furnishing the \$400 to pursue the necessary assessment work prior to December 31st, and I will advise you.

Yours truly.

JLH."

The next is a letter from Mr. Percy W. Evans to John L. Howard, under date of February 8, 1909, reading as follows:

"Vancouver, B. C., 8th Feb., 1909. M.
John L. Howard, Esq.,
The Western Fuel Co.,
Nanaimo, B. C.

Dear Mr. Howard: I have been expecting to hear

of your coming over to pay us the usual visit on your way South, but not having heard anything from you, I do not know whether you have changed your mind and are going back via Victoria instead.

Of course I am very anxious to know how you are getting on with that unfortunate Dingee affair. I did hear indirectly that you had secured a mortgage on his property near Redwood City and if such is the case, I suppose we can consider ourselves amply secured; if you have not, then I for one would be in favour of pushing Dingee to the utmost point, even going so far as to put him in gaol if it were possible, and I know my partners feel the same way, Surely something can be done at once on account of delinquent interest?"

After sundry other paragraphs relating to other matters the letter closes:

"Yours sincerely, PERCY W. EVANS."

The next is a letter dated March 18, 1909, from C. W. Howard to Mr. John L. Howard, reading as follows:

"March 18, 1909.

Mr. John L. Howard,
c/o Western Fuel Co.,
Nanaimo, B. C.

Dear Sir: I have been requested by Mr. Dingee to forward for your execution the enclosed deed. Kindly sign the same 'John L. Howard, and acknowledge the same before a Notary Public having a seal. Be sure and have the Notary insert in the proper blanks in the acknowledgement and following his signature, the designation of his official title. If

(Testimony of John L. Howard.)

his seal does not bear an impression of the date of expiration of his commission, have him insert that following the designation which follows the signature. When same has been properly executed, kindly return to me.

Mr. Dingee did not specifically state whether the deed was to be executed to the cement company or to him individually. If it is your understanding that it is to go to him individually, you [617—193r] can have the deed re-written, following the enclosed form.

Yours truly,

C. W. HOWARD.

Enc.

CWH:J.”

Mr. OLNEY.—In that connection, Mr. Dunne, I would like to have an admission that the deed was executed—executed to the Standard Portland Cement Corporation.

Mr. DUNNE.—I think the deed is in evidence. I think it was offered when Mr. Howard was on the stand, was it not, Mr. Howard?

Mr. HOWARD.—Yes, it is here.

Mr. OLNEY.—There are, apparently, two deeds. This letter is dated March 18, 1909. At the time of the consummation of the transactions involved here, in April and May, 1908, you made a deed, did you not, Mr. Howard?

Mr. HOWARD.—That deed will show the date. The deed ought to be here.

Mr. OLNEY.—We will have the matter looked up

(Testimony of John L. Howard.)

later, if your Honor please.

Mr. DUNNE.—Mr. Howard, is this your letter? (Handing.) There is nothing there to indicate the authorship.

Mr. HOWARD.—That is a carbon copy of a letter I wrote from Nanaimo.

Mr. DUNNE.—The next is a letter from Mr. John L. Howard to C. W. Howard, under date of April 14, 1909, reading as follows:

“April 14, 1909.

C. W. Howard, Esq.,

Bellingham, *Was.*

Dear Sir: I have just arrived here from the East and find your letter of March 18th with a form of Deed.

I will ascertain upon my arrival home in what way Mr. Dingee desires the deed to be made, and will then execute it and hand it to him.

Our Washington Correspondent writes me as follows, under date of March 26th:—[618—193s]

‘Up to today the Land Office have received no report on your stone claim in Washington. We have again urged them to take the matter up, promptly, and dispose of it.’

Yours truly,

Pres’dt.”

The next is a letter from Ernest E. Evans to John L. Howard, from Vancouver, under date of April 14, 1909, reading as follows:

“Vancouver, B.C., 14th April, 1909, H.
John L. Howard, Esq.,
c/o Western Fuel Company.
San Francisco.

Dear Mr. Howard: I was very pleased to find on my return that the Western Fuel Co^l had recommended paying dividends and I sincerely trust that from henceforth, everything will run very satisfactory.

Mr. C. D. Rand, who holds a Standard Portland Cement Co. note for \$5000. telephoned me yesterday, reminding me that this came due on the 1st day of May, and asking me what he should do, and I told him that I would write you. He stated, however, that as he was going away, he would hand the note to the Bank of Montreal, for collection, but I shall be much obliged if you will kindly telegraph us on receipt of this letter, whether you wish us to send our note to you or send it through our Bankers.

With kind regards,

Yours sincerely,

E. E. EVANS.

E.E.E.”

The next is a letter from E. E. Evans to John L. Howard from Vancouver, dated April 23, 1909, reading as follows:

“Vancouver, B. C. 23rd April, 1909. H.
John L. Howard, Esq.,
Western Fuel Company,
San Francisco.

Dear Mr. Howard: Not having received any tele-

gram from you with regard to the Northwestern Portland Cement Co. note, I handed ours to the Bank of Montreal this morning, to be forwarded to their Agents in San Francisco, who I understand are the Anglo California Bank, with instructions to notify the Standard Portland Cement Co. immediately on receipt, that they hold this note and that it would be presented for payment at their office at maturity.

I thought it was only right that the Company should have some days' notice, in case they have no record of the notes.

Yours faithfully,

E. E. EVANS.

E.E.E."

The next is a letter from Evans, Coleman & Evans to John L. Howard, from Vancouver, dated the 29th of April, 1909, reading as follows: [619—193t]

"Vancouver, B. C. 28th April, 1909.

John L. Howard, Esq.,

Western Fuel Company,

San Francisco.

Dear Sir: I have to acknowledge receipt of your favor of 26th inst. and have requested the Bank of Montreal to instruct their San Francisco correspondents to hand over our Standard Portland Cement Co's note for \$30,000 to you, in the event of its not being paid at maturity, as per copy of letter herewith.

Yours faithfully,

EVANS, COLEMAN & EVANS.

E.E.E."

Below which, in blue pencil written by Mr. Howard, are the initials "D. C. N"—referring to Mr. Norcross.

The copy of the letter attached is as follows:

"29th April, 1909. H.

Evans, Coleman & Evans: Copy.

The Manager,

Bank of Montreal,

Vancouver.

Dear Sir:

Referring to ours of 23rd instant enclosing you the Standard Portland Cement Corporation's promissory note in our favor, dated San Francisco May 1st, 1908, for \$30,000., payable with interest at the rate of 6% semi-annually, endorsed by William J. Dingee and Irving A. Bachman, will you kindly instruct your San Francisco correspondents, in the event of the note not being *made* at maturity, to hand same over to Mr. John L. Howard, President of the Western Fuel Co. 430 California Street, taking a formal receipt from him, and much oblige,

Yours faithfully.

E.E.E."

The next is a letter from Evans, Coleman & Evans to John L. Howard, under date of May 6th, 1909, reading as follows:

"Vancouver, B. C. 6th May 1909. H.

John L. Howard, Esq.,

c/o Western Fuel Company,

San Francisco.

Dear Sir: are in receipt of your favor of 3rd

instant, and note that the Standard Portland Cement Co. refused payment of their [620—193u] *their* promissory notes.

With regard to Mr. C. D. Rand's note, we telephoned him first thing this morning, and he stated that he would get the Bank of Montreal to telegraph at once to the Anglo Californian Bank, to deliver same over to you, and we trust that there will be no delay in going ahead with the suit."

Then there is a paragraph about matters that are not connected with this transaction at all and the letter ends:

"Yours faithfully,
EVANS, COLEMAN & EVANS.
E.E.E."

The next is a letter from Mr. John L. Howard to Messrs. Evans, Coleman & Evans, under date of May 10, 1909, and is as follows:

"May 10, 1909.
Mess. Evans, Coleman & Evans,
Vancouver, B. C.

Dear Sirs:

I am in receipt of your letter of May 8th and note that Mr. Rand has had the Anglo California Bank instructed to turn over his note to me.

I hold it, and have given a receipt to that Bank, but have been awaiting authority before telling Mr. Olney to include Mr. Rand's note in the suit.

I understand that Mr. Olney has all the papers prepared, but I want first to get out of the way another little matter with Mess. Dingee and Bachman, which will be closed speedily, and then I will

tell Olney to let loose the dogs of war.

Cameron, the President of Cement Companies, recently said to me that there was nothing in those notes, that McEnerney, Henshaw, two directors, were absent and that Dingee, Bachman and Young and other directors, authorized the purchase of the Northwestern Bonds.

We hold the certified copy of the resolution of authorization which states that at a duly called meeting, etc.

This means that notice was sent to McEnerney and Henshaw, and if they did not attend, the act of the majority is not invalidated by the fact of their absence.

In so far as he has the facts, Mr. Olney thinks that the Cement Company cannot escape honoring those notes.

As to the annual statements of Brick and Plaster Companies. They were not sent through oversight. I have been very little at home during this year, and when here have been driven to death with work. But I'll send them.

The Brick Company has had bad luck and has not done well. [621—193v]

For the present, don't count the shares as worth much, but don't wipe them out. A break during my eastern trip forced the making of changes, and I confidently look for a great improvement when they shall be finished within two weeks.

The Plaster Company more than held its own last year. We are now on the eve of striking a ledge of gypsum Rock which will enable us also to turn out white plaster.

When we get this, I think we will try to sell the outfit and think we can make a good turn over.

The various enterprises for which I am wet nurse are keeping me in constant slavery, and I am working to get out of many of them in order to get a well-earned rest.

Yours truly,

J.L.H.”

The next is a letter dated May 17th, 1909, from Evans, Coleman & Evans to John L. Howard, reading as follows:

“Vancouver, B. C. 17th May 1909. H.
John L. Howard, Esq.,
Western Fuel Co.,
San Francisco.

Dear Sir: We have to thank you for your favor of 10th instant, and note that you have received the Standard Portland Cement Co's promissory note in favour of Mr. Rand.

Referring to the enclosed cutting from the San Francisco Examiner, is this the property which we have been told once or twice, was worth \$600,000?

Yours faithfully,

EVANS, COLEMAN & EVANS.

E.E.E.”

And attached thereto is a newspaper clipping, the headlines of which are

“125,000 TOTAL OF DINGEE PARK SALE.”

There is no occasion to stop to read that.

The next is a letter dated May 14, 1908. I will ask you gentlemen to admit that the letter I am about to

read, dated May 14th, 1908, was written by Mr. D. C. Norcross, Secretary of the Western Building Material Company and also of the Western Fuel Company.

Mr. PRINGLE.—Yes.

Mr. DUNNE.—This letter is dated May 14th, 1908, written by Mr. D. C. Norcross and addressed to William J. Dingee. It has stamped on the face of the first sheet, on the top, the words “Western Building Material Co.” [622—193w]

The letter reads as follows:

“May 14th, 1908.

William J. Dingee, Esq.,
Crocker Building,
City.

Dear Sir: Here with the following stock CERTIFICATES of the NORTHWESTERN PORTLAND CEMENT COMPANY, which I have endorsed for transfer to your order:—

Cerf. No.		Shares.
51	John L. Howard, Trustee.....	250
52	do “	30 Spencer
53	do “	(in ink.)
		30 Stockett
		(in ink.)
65	Ernest E. Evans.....	150
66	do	150
68	do	1000
69	do	150
75	Helen L. Howard.....	1000
76	do	1000
77	do	1000
78	do	1000
79	do	1000
80	J. L. Schmitt.....	100
82	Jean S. Schoonmaker.....	50
83	Edith S. Howard.....	50
84	John L. Howard.....	40
132	1900
		<hr/> 8900

(Testimony of John L. Howard.)

There is yet to be delivered one certificate of one hundred shares. Kindly acknowledge receipt of above shares.

Yours very truly,
Secretary."

The next is a package of papers, pinned together, the first of which is a slip on which the following appears:

"D. C. N. Preserve this. Northwestern File."

I will ask you, Mr. Howard, to look at the first of these slips and tell me in whose handwriting the first pencil memoranda are.

Mr. HOWARD.—The first three lines are in mine; the last two I recognize as the writing of Mr. Norcross, which reads "Northwestern [623—193x] File."

Mr. DUNNE.—The second of the attached papers is a portion of an envelope, addressed "Western Fuel Company, 430 California Street, San Francisco," upon which appears the following—

Mr. OLNEY.—Mr. Dunne, if you are going to put that in let us get it in straight. It appears as a portion of a used envelope, the address being "Western Fuel Company, 430 California Street, San Francisco"; then on the reverse side, which in the file appears as the front side, is a memorandum, in Mr. Howard's hand, which is as follows—now, you can read it.

Mr. DUNNE.—Yes, that is right. I would like to have it also appear in the Reporter's notes that on

(Testimony of John L. Howard.)

the piece of this envelope is the postoffice stamp, "San Francisco, Marcy 30, 1908." The passage in pencil, written upon the second of these slips, reads thus: "Miss Watson. Preserve this with pencil copy of the Resolution." I will exhibit this to you, Mr. Howard, and ask you to state, if you please, in whose handwriting are the pencilled words "Miss Watson. Preserve this with pencil copy of the Resolution."

Mr. HOWARD.—That is in my handwriting.

Mr. DUNNE.—The third of these papers is written partly in pencil and partly in ink. It reads thus:

"San Francisco, April 1908.

For value received the Standard"—that word "Standard" being written in ink—"Portland Cement"—now, the next word I will ask that it may be stipulated that it was originally written in pencil "Company" but was afterwards changed so as to read "Corporation," the word Corporation being written all of it in ink except the letter "C."

Mr. PRINGLE.—That is correct. [624—193y]

Mr. DUNNE.—And then it reads: "promises to pay to the order of Sidney V. Smith, on or before one year from May first, 1908, the sum of Twenty five thousand dollars, with interest thereon from said day until paid at the rate of six per cent per annum payable semi-annually, and if not so paid to be compounded." Then follows the word "Standard" written in ink and the words "Portland Cement" written in pencil and then the word "Company" written in

(Testimony of John L. Howard.)

pencil, over which the word "Corporation" is written in ink, all of it except the first letter "C."

"By, President.
, Secretary."

On the back of this same yellow sheet, being No. 3 of this present series, appears.

" (Endorser.)"

And then below that is the following:

"For value received I hereby waive presentment, demand, *protes* and notice of nonpayment of within note.

. (Waiver)."

I will exhibit that paper to you, Mr. Howard, and ask you please to examine it and state in whose handwriting it is.

Mr. HOWARD.—The handwriting is that of Mr. Sidney V. Smith who drafted it as a form of note. The letters written in ink are in my handwriting.

Mr. DUNNE.—Will you kindly look at the back and tell us about that.

Mr. HOWARD.—That is Mr. Smith's handwriting.

Mr. DUNNE.—The fourth of the attached papers contains a memorandum written upon the inner surface of the front of an envelope addressed "Western Fuel Co. 430 California St., San Francisco, Cal.," [625—193z] with the postoffice stamp of March 30, 1908, upon it, and reads thus: "D. C N"—and across the "D.C.N." are some pen lines, and then the letters "L.W." "Hand me a copy on plain paper." I

(Testimony of John L. Howard.)

will ask you to look at that, Mr. Howard, and tell me in whose handwriting that memorandum is.

Mr. HOWARD.—That is my handwriting. “L. W.” refers to the stenographer.

Q. Whose name is what?

Mr. HOWARD.—Louise Watson, I think.

Mr. DUNNE.—The fifth of the attached papers reads thus: “Resolved: that the President be and he is hereby authorized and directed to buy bonds of the Northwestern Portland Cement Company and the shares of the stock of said Company which have been issued to the holders of said bonds in the proportion of”—the word “two” *have* been written over it in heavier pencil-marking, the word “one”—

Mr. PRINGLE.—And in the same handwriting.

Mr. DUNNE.—That may be: “shares”—the final “s” of the word “shares” being crossed off with a pencil mark; “of such stock for every one *hundre* dollars of the amount of such bonds and in payment therefor to give to each person from whom such bonds and shares shall be bought the note of this company executed and”—the word “and” being penciled out—“on or before one year from May 1st, 1908, for the amount of such bonds so purchased, bearing interest at the rate of six per cent per annum from said date until paid, payable semi-annually, and to be compounded if not so paid.” Mr. Howard, in whose handwriting is that?

Mr. PRINGLE.—That is the handwriting of Mr. Sidney V. Smith.

Mr. DUNNE.—Then, it may be stipulated that the

paper last read is in the handwriting of Mr. Sidney V. Smith. [626—193aa]

The sixth of the attached papers is written entirely in ink, and is as follows:

“San Francisco, 1908.

For value received the Standard Portland Cement Corporation promises to pay to the order of on or before one year from May first, 1908, the sum of Dollars, with interest thereon from said day until paid at the rate of six per cent per annum payable semi-annually and if not so paid to be compounded.

STANDARD PORTLAND CEMENT CORPORATION.

By, Pres't.

., Secty.

Over.

.

For value received, I hereby waive presentment, demand, protest and notice of nonpayment of within note.

.”

It is stipulated that the paper last read is in the handwriting of Mr. John L. Howard.

The seventh of the papers hereto attached reads thus: It is typewritten:

“San Francisco,, 1908.

For value received the Standard Portland Cement Corporation promises to pay to the order of on or before one year from May first, 1908, the sum

(Testimony of John L. Howard.)

of dollars with interest thereon from said day until paid at the rate of six per cent per annum, payable semi-annually, and if not so paid to be compounded. [627—193bb]

STANDARD PORTLAND CEMENT CORPORATION.

By, Pres't.
, Secretary."

On the back of which are the following words, likewise in typewriting: "For value received, I hereby waive presentment, demand, protest, and notice of nonpayment of within note." Mr. Howard, can you identify the typewriting on the back of that seventh paper?

Mr. HOWARD.—It is very much like what was used in our office at that time.

Mr. DUNNE.—And finally, the last paper in this series reads thus:

"RESOLVED: That the President be, and he is hereby authorized and directed to buy bonds of the Northwestern Portland Cement Company and the shares of the stock of said company which have been issued to the holders of said bonds in the proportion of one share of such stock for every One Hundred Dollars of the amount of such bonds, and in payment therefor to give to each *person whom* such bonds and shares shall be bought, the note of this company executed by the President and Secretary under the corporate seal, payable on or before one year from May 1st, 1908, for the amount of such bonds so purchased, bearing interest at the rate of six per cent

per annum from said date until paid, payable semi-annually and to be compounded if not so paid.”

Across the face of which, in pencil, appears a word which I read as the word “changed.”

Mr. OLNEY.—It is written in the handwriting of Mr. Young.

Mr. DUNNE.—It is in the handwriting of Mr. Young, I believe. And below which, also in pencil, in the handwriting of Mr. John L. Howard, is the following: “the amount of authorization to purchase \$100000—bonds.”

Mr. OLNEY.—It is stipulated that Mr. Young’s resignation as a director of the Northwestern Portland Cement Company was accepted on May 3, 1909, and also that Mr. Young tendered his resignation as secretary to the Northwestern Portland Cement Company [628—193cc] on December 1st, 1908, and that his resignation as to that date as secretary was accepted.

Mr. BROBECK.—I would like to offer also the minutes of the meeting of the Board of Directors of the Standard Portland Cement Corporation, held the 5th of May, 1908, the minutes of that entire meeting in view of the fact that the only business transacted at that meeting was the adoption of the resolutions effecting these notes.

The MASTER.—I will hear the evidence.

Mr. BROBECK.—I read from page 45 of the Minute Book of the Standard Portland Cement Corporation as follows:

“Office of the
STANDARD PORTLAND CEMENT CORPORA-
TION.

Crocker Building.

San Francisco, Cal., May 5, 1908.

A special meeting of the Directors of the Standard Portland Cement Corporation was held at the office of the company Rooms 311-316 Crocker Building, San Francisco, Cal., at the hour of 3 o'clock P. M., pursuant to the call of the President.

Proof was first made that notice had been given the Directors of this special meeting in accordance with the By Laws.

The following directors were present:

William J. Dingee.

Irving A. Bachman.

Edward McGary.

Absent:

F. W. Henshaw.

Garret McEnerney.

President Irving A. Bachman presided.

On motion of Director Dingee, seconded by Director McGary, the following resolution was unanimously adopted: [629—193dd]

RESOLVED, That the President or the Vice President or either of the Vice Presidents of this corporation be, and he is hereby authorized and directed on behalf of this Corporation to buy One Hundred (100) bonds of the Northwestern Portland Cement Company for one Hundred Thousand Dollars (100,000), together with the shares of stock of

said company which shares have heretofore been issued to the holders of said bonds, in the proportion of one (1) share of stock for each and every hundred dollars of the amount of said bonds. And he is further authorized to give the obligation or the obligations of this corporation in payment therefor to each person or persons from whom such bonds and shares shall be bought, which obligations shall be executed by him under the name of this corporation and attested by the Secretary under the corporation seal, and shall be made payable on or before one (1) year after May 1st, 1908, and shall bear interest at the rate of six per cent (6%) per annum from said date until paid; interest to be made payable semi-annually and to be compounded if not so paid. He is further authorized when such obligation or obligations shall become due, and if then unpaid, to renew the same from time to time until the amount due is paid in full.

There being no further business before the Board the meeting adjourned.

L. F. YOUNG, Secretary."

Mr. BROBECK.—I desire also, if your Honor please, to offer in evidence that portion of the minutes of the Board of Directors of the Standard Portland Cement Corporation held in the office of the corporation on January 28, 1908, which refers to a resolution authorizing the borrowing from the Crocker National Bank of San Francisco of the sum of \$190,000.00. After stating the preliminaries and who [630—193ee] was present, it reads as follows:

“The following Directors were present:

William J. Dingee.

Irving A. Bachman.

Edward McGary.

Absent:

F. W. Henshaw.

Garret W. McEnerney.

On motion of Director Dingee seconded by Director McGary, the following resolution was unanimously adopted:

RESOLVED: That the President or the Vice-President or either of the Vice-Presidents of this Corporation be, and he is hereby authorized on behalf of this corporation to borrow from the Crocker National Bank of San Francisco, on such terms as he may approve the sum of One Hundred and Ninety Thousand Dollars (\$190,000). He may give the obligation or obligations of this corporation for such loan, and he is hereby authorized to pledge as security for the repayment thereof such assets of this Corporation as may be required and agreed upon between him and the said Crocker National Bank of San Francisco. He is further authorized, when the obligations evidencing such loans mature, to renew the same, in whole or in part, from time to time until the amount is paid in full.

There being no further business before the Board, the meeting adjourned.

L. F. YOUNG, Secretary.”

Mr. BROBECK.—We also offer that portion of the minutes of the meeting of the Standard Portland Cement Corporation which was held in the office of

the corporation on February 26, 1908, and at which meeting there appears to have been present, William J. Dingee, Irving A. Bachman and Edward McGary and from which meeting there appears to have been absent F. W. Henshaw and Garret W. McEnerney, and which minutes read as follows: [631—193ff]

“On motion of Director Dingee, seconded by Director McGary the following Resolution was unanimously adopted:

RESOLVED: That the President or Vice-President of this Corporation be, and he is hereby authorized on behalf of this Corporation to borrow from the First National Bank of Oakland, on such terms as he may approve, the sum of Nineteen Thousand Dollars (\$19000). He may give the obligation or obligations of the corporation for such loan, and he is hereby authorized to pledge as security for the repayment thereof such assets of this corporation as may be required and agreed upon between him and the said The First National Bank of Oakland. He is further authorized when the obligations evidencing such loans mature, to renew the same, in whole or in part, from time to time until the amount is paid in full.

There being no further business before the Board, the meeting adjourned.

L. F. YOUNG, Secretary.”

Mr. BROBECK.—I would like to ask you, Mr. Howard, whether you have any official connection with the First National Bank of Oakland?

(Testimony of John L. Howard.)

A. None. I had not at that time; I did not have any at that time.

It was here stipulated by counsel for the plaintiffs in the action at law, to wit: Evans, Coleman & Evans, are residents of the Province of British Columbia of the Dominion of Canada, and subjects of the King of Great Britain; and likewise that their assignors, Rand, Stockett and Graham are similar residents and citizens; and also that the plaintiffs are partners under the name of Evans, Coleman & Evans, and still hold these notes as attorneys. It was then further stipulated between the parties in the stipulation last hereinabove referred to extend also to the [632—193gg] equity action and are understood to be made to cover both actions. It was further stipulated between the parties that Mr. Dingee and Mr. Bachman at the time the action was brought were residents of San Francisco.

Mr. OLNEY.—I notice, Mr. Dunne, that you had read into the evidence the endorsements to or by certain banks on the back of the notes that were put in evidence. Is there any question about the fact that those notes were, at the time the action was brought, the property of the plaintiffs—the action at law?

Mr. DUNNE.—My recollection is that those endorsements were simply for collection purposes.

Mr. OLNEY.—Yes, that is the fact. I simply want to know that no point is being made through the failure on our part to show that fact.

Mr. DUNNE.—No. That is my recollection of it.

Mr. OLNEY.—So there is no point made on that question?

Mr. DUNNE.—No. There was no transfer of title. The endorsement was merely for collection purposes.

The MASTER.—Then, that admission is given, is it?

Mr. DUNNE.—Yes, sir, that is the fact.

It was further stipulated between the parties that Mr. John L. Howard was authorized to execute the endorsement by Stockett, trustee, and Graham which appear on the backs of the notes that have been offered in evidence.

Mr. DUNNE.—We wish to offer in evidence the following documentary evidence which seems to have been overlooked heretofore, in developing the history of this enterprise. I think, Mr. Olney, this telegram has already been called to your attention. I do not think you have seen the telegram, but its substance I think has been stated here. (Handing.)
[633—194]

Mr. OLNEY.—Reserving the right to exhibit it to Mr. Howard when he comes, and then possibly to object to it, it may go in; I imagine it is authentic.

Mr. DUNNE.—Oh, yes, it is so far as we know.

Mr. OLNEY.—Oh, yes, absolutely, so far as you know; I have no imagination on that point at all.

Mr. DUNNE.—It reads thus:

“July 5, 1906.

To John L. Howard,
Nanaimo, B. C.

Purchase all properties outright. Draw on me personally Jas. H. Goodman Co. Bank Napa and have papers made out in my name. Act as expeditiously as possible so can go ahead with organization.

IRVING A. BACHMAN.”

The next is a letter from D. C. Norcross, Secretary to the Standard Portland Cement Corporation, reading as follows:

“June 3, 1908.

Standard Portland Cement Corporation,
Crocker Building,
San Francisco, Cal.

Dear Sir: I have the following securities of the Northwestern Portland Cement Company ready for delivery to you in exchange for your note dated May 1st, 1908, payable on or before one year after date, at 6% interest—

10 bonds, numbered 158 to 167, inclusive.

Certificate #177 in the name of E. H. Warner for 50 shares.

Certificate #178 in the name of W. P. Warner for 50 shares. Will you kindly advise when I can get your notes (in favor of the two gentlemen in whose names these two certificates are) endorsed by Mr. Dingee and Dr. Bachman.

Yours truly,

D. C. NORCROSS,

DCN.”

Secretary.

The next is a letter from John L. Howard to W. J. Dingee, from Bellingham, dated August 14, 1908, reading as follows:

“August 14, 1908.

Mr. W. J. Dingee,

Crocker Building,

San Francisco, Cal. [634—194a]

Dear Sir: I arrived last night, and learn today that you are shipping by rail all the construction material and equipment which was on hand at Kendall belonging to the Northwestern Portland Cement Co.

You may remember that in my arrangement with Dr. Bachman Authority was given Mr. Paige to buy a lot of new rail. These, I think, were paid for by the Cement Co., but they were intended to improve the main line of the B. B. & B. C. R. R. Co. which, in turn, was to furnish the Cement Co. with rails taken up out of its main line for relaying in the spur that was built into the N. W. Cement Co.'s property. Inasmuch as you are eventually not needing this spur for sometime, I presume you would be willing to turn the rails, fish-plates, and ties now laid into money. In which case, I think Messrs. Balfour-Guthrie & Co. would be willing to buy them.

If you agree with my view of it, and will write to Mr. H. B. Paige, Supt. of the B. B. & B. C. R. R. Co., giving him authority to dispose of them (but at not less than it cost to you), he will take up the discussion with them on these lines. Of course, he will include in his figures the cost of *lay* them down and take

the material up, so that you will be re-imbursed in those respects.

Very truly yours,

JOHN L. HOWARD,

Per B. H."

Mr. DUNNE.—The next is a note from John L. Howard to W. J. Dingee. It reads as follows:

"W.J.D.—The woods are full of new Cement schemes. Baker is reported as having secured a 15 day option on the Washington Cement plant.

Evans, Coleman & Evans have sent their note thro Bank of Montreal for collection so they wire.

Apl. 26.

Yrs.

J. L. HOWARD."

Mr. OLNEY.—I think it appears right on the face of that, does it not, Mr. Dunne, that the Washington Cement plant is not the Northwestern Portland Cement Company?

Mr. DUNNE.—It is described there as the Washington Cement plant.

Mr. OLNEY.—Then, it is agreed, is it, that the Washington Cement plant does not mean the Northwestern Portland Cement Company?

Mr. DUNNE.—I don't know about that. We will wait until Mr. Howard comes in.

Mr. OLNEY.—It is perfectly plain from the contents there that it is not.

Mr. BROBECK.—Well, if the contents make it plain, that [635—194b] ends it, does it not?

Mr. DUNNE.—The next is a letter from L. F. Young to W. J. Dingee, under date of April 30, 1909. The heading is:

“STANDARD PORTLAND CEMENT CORPORATION, Crocker Building.”

The letter reads as follows:

“San Francisco, Cal. April 30, 1909.

William J. Dingee, Esq.,

Mills Bldg.,

San Francisco, Cal.

Dear Sir: We have received notice from the Anglo & London Paris National Bank that they hold two notes signed by this corporation due May 1, 1909; one for \$30,000 and interest, and the other for \$5,000 and interest. The \$30,000 note is made payable to the order of Evans, Coleman & Evans, and the \$5,000 note is made payable to the order of Chas. D. Rand. Both of these notes are endorsed by yourself and Irving A. Bachman.

We also received notice today from the First National Bank of San Francisco that they hold the following notes of the Standard Portland Cement Corporation, payable May 1, 1909.

\$19,000

3,000

3,000

3,000

1,000

25,000

Aggregating \$55,000 and interest.

(Testimony of L. F. Young.)

I have not had an opportunity of going to the First National Bank and ascertaining who the payees of these notes are, but presume they are notes similar to the \$30,000 and \$5,000 notes above referred to, except different payees.

These notes are the ones you gave Mr. Howard and his friends in the transaction relating to the Northwestern Portland Cement Company.

I am directed to inform you that this Company does not recognize these notes as obligations binding upon it, and you are requested to give their payment your attention.

Yours very truly,

STANDARD PORTLAND CEMENT
CORP.

L. F. YOUNG,
Secretary.

Dict. LFY/GD."

**[Testimony of L. F. Young (Recalled—Further
Redirect Examination).]**

Thereupon L. F. YOUNG was recalled for further redirect examination [636—194c] and thereupon testified as follows, to wit:

I recognize this as the first acceptance given by the Western Building Material Company to the Cement Company and dated March 28, 1908. It is a draft drawn by the Santa Cruz-Portland Cement Company by myself as secretary on the Western Building Material Company payable April 13th,

1908, and indorsed on the back, "Accepted, Western Building Mtl. Co. John L. Howard, Pt." This is the first of that series of acceptances which has been listed here, and which are in evidence.

Mr. BROBECK.—I offer this in evidence.

The MASTER.—It will be marked as Complainant's Exhibit 16.

Thereupon said Complainant's Exhibit 16 was received and read in evidence in the above-entitled action, and is in words and figures as follows, to wit:

[Complainant's Exhibit No. 16.]

"\$10,000.00 San Francisco, Mch. 28, 1908.

On April 13, 1908, pay to the order of Santa Cruz Portland Cement Co. Ten Thousand Dollars. Value received and charge the same to account of Western Building Material Co., 430 Calif. St.

Santa Cruz Portland Cement Co.

L. F. YOUNG, Secty.

No. 3099 Due Apr. 13."

(In red ink in lower left-hand corner the figures 3099 are in red ink. Also: "Due Apr. 13" in red ink.)

(Endorsed on back of note): "Santa Cruz Portland Cement Co. by L. F. Young, Secty." (In ink.) "Accepted Western Building Matl. Co. John L. Howard Pt."

When I first went into the employ of the Northwestern Portland Cement Company, the former secretary handed me a book in which he kept a list of

(Testimony of L. F. Young.)

the bond subscribers for the Northwestern Portland Cement Company. In fact, he handed me books covering [637—195] the bond subscription of all the companies that had bonds. This is the book he handed me at that time (indicating). Across both pages of this book indexed under the letter “H” there appeared the words “John L. Howard” under date of November 1st, 1906, and—

Mr. OLNEY.—One moment. We object to the introduction of this book, if the Court please, or any entries in it on the ground that same is merely hearsay and not the best evidence.

Mr. BROBECK.—Q. Do you know whether that was the book among the records of your company which contains the subscription and sales of the bonds of Northwestern Portland Cement Co.? [638—195a]

A. It was. I understand that it was prior to my coming in the company. I kept the list differently when I went in there.

The MASTER.—It is simply a memorandum, is it not—it is not the subscription book itself, is it?

A. It is a memorandum of the subscriptions.

Mr. OLNEY.—Q. You know nothing about the actual facts that may be represented in that book, do you?

A. No other than that it was turned over to me and I was told that it was the book of the bond subscriptions.

Q. And that is all you know about it?

A. That is all I know about it.

(Testimony of L. F. Young.)

Mr. OLNEY.—We renew our objection.

The MASTER.—The objection is sustained.

Mr. BROBECK.—We note an exception.

The WITNESS.—(Continuing.) This slip or memorandum here which you show me is in the handwriting of William J. Dingee; as to what it purports to indicate, it is entitled “Northwestern Sub.,” standing for subscription.

Q. That is for bonds of the Northwestern Portland Cement Company?

Mr. OLNEY.—One moment. Do you intend to offer that in evidence, Mr. Brobeck?

Mr. BROBECK.—We will offer it.

Mr. OLNEY.—And you make the offer now?

Mr. BROBECK.—I do; yes.

Mr. OLNEY.—We object to it as incompetent and as hearsay, and is not binding upon any of the parties to this action, and not within the knowledge of the witness.

The MASTER.—The objection is sustained.

Mr. BROBECK.—We note an exception.

Q. I show you a receipt signed “John L. Howard by D. C. Norcross.” May it be stipulated, Mr. Olney, that that is [639—196] in the handwriting of Mr. Norcross?

Mr. OLNEY.—Yes.

Mr. BROBECK.—And also a receipt signed by Western Building Material Company by J. F. Scanlon. It is stipulated, Mr. Olney, that that is the signature of Mr. Scanlon representing the Western Building Material Company.

(Testimony of L. F. Young.)

Mr. OLNEY.—Yes.

Mr. BROBECK.—I offer these receipts in evidence.

The MASTER.—Is there any objection?

Mr. OLNEY.—No, sir, we have no objection.

The MASTER.—Let them be marked respectively Complainant's Exhibits 17 and 18.

Thereupon said exhibits 17 and 18 were received and read in evidence in the above-entitled action, and are in the words and figures as follows, to wit :

[Complainant's Exhibit No. 17.]

“San Francisco, Cal., Jan. 5, 1907.”

(Jan. 5, 1907, in purple rubber stamp.)

“Received of Northwestern Portland Cement Co. Bonds #1 to 50 inclusive.”

(The word “Dollars” is scratched out by pen.)

“JNO. L. HOWARD.

By D. C. NORCROSS.”

[Complainant's Exhibit No. 18.]

“San Francisco, Cal., Mar. 14, 1907.”

(Mar. 14, 1907, in black rubber stamp.)

“RECEIVED of Northwestern Portland Cement Co.” (in purple rubber stamp) “5 bonds” with the word “Dollars” scratched out with pen) “3213 to 217 Inclusive.

WESTERN BLDG. MATL. CO.,

Per J. F. SCANLAN.”

(Testimony of L. F. Young.)

The WITNESS.—(Continuing.) I have no recollection of any such notes of the Standard Portland Cement Corporation being ever executed in favor of either of the Warners and are referred to in the [640—197] *the* letter just introduced, or that such notes have ever been presented for payment. The only demand that was ever made to my knowledge upon any of the notes which are in suit here, upon the Standard Portland Cement Corporation, was the demand that was made when the notes were presented through the banks for payment. Previous to that time, no demand had been made upon the Standard Portland Cement Corporation for the payment of any interest that I ever heard of. I know William M. Cannon. I believe he is an officer of the Northwestern Portland Cement Company. I don't know whether a vice-president or president. I believe he is the [641—197a] attorney for it as well, or was. Subsequent to the 18th day of November, 1908, when the Standard Portland Cement Corporation and the Santa Cruz Portland Cement Corporation were taken over by the Crocker interests, I saw Mr. Cannon in connection with the disposition of the bonds of the Northwestern Portland Cement Company. Mr. Cannon called upon me and wanted to know what bonds of the Northwestern I had, and wanted to count them. So we proceeded to the safe deposit vault and counted them and upon my coming back upstairs I made a memorandum of what took place at the interview, and this is the memorandum regarding that. I can tell from this memorandum

(Testimony of L. F. Young.)

what bonds were found by me and Mr. Cannon to be at that time in my possession as bonds of the Northwestern Portland Cement Company; they were bonds No. 301 to 400, inclusive, with coupon No. 2 and following attached; bonds No. 1 to 50, with coupon No. 4 and following; bonds No. 123 to 157, inclusive, with coupon No. 4 and following; bonds 213 to 217, inclusive, with coupon No. 4 and following; bond No. 295, with coupon No. 3 and following; bonds 296 to 300, with coupon No. 1 and following; bond No. 65, with coupon No. 4 and following: that was the third day of March, 1909, when that transaction occurred. That totals 197 bonds, and all these bonds at that time were in the treasury of the Northwestern Portland Cement Company. The list of bonds just read includes the 90 bonds which were received by me through Mr. Norcross. Nobody other than myself has access to the safe deposit box in which those bonds are kept.

Mr. OLNEY.—Q. Mr. Young, you testified the other day: “Q. Do you remember calling to Mr. Gregg’s attention in November, 1908, the facts of this transaction by which the notes of the Standard were out of the various parties for the purchase of the Northwestern bonds and stocks. A. I remember this, that Mr. Dingee had sent a statement down to them which in my judgment [642—198] was not correct, and I so informed Mr. McEnerney, who was acting on behalf of Mr. Dingee. He asked me if I could prepare a correct statement, and I told him that I could at least show some corrections that

(Testimony of L. F. Young.)

should be made, that there were some outstanding obligations or transactions the nature of which I was not fully informed as to, and they should be brought to the attention of the people contemplating buying or taking the corporation, and I got up a new trial balance, and put on the end of it an addenda, meaning thereby things which did not appear in the trial balance”—

The WITNESS.—(Intg.) I wish to correct that and say, “things that did not appear on the books.”

Mr. OLNEY.—(Continuing.) “There had been the transfer of the credits from accounts and there had been some outstanding obligations and power bills and these notes which I wish to be brought to the attention of Mr. Gregg. I gave a similar copy of that to Mr. James Smith for Mr. Howard. Q. And this addenda showed, did it not, \$100,000 of Standard Portland Cement Corporation notes for the purchase of the bonds and stock of the Northwestern Portland Cement Company? A. I don’t remember that it used exactly the word ‘purchase,’ but it showed there some \$100,000 liability outstanding on account of these bonds, yes.” Now, in connection with that testimony, I show you a copy, or what purports to be a copy, of the statement of the Standard Portland Cement Corporation of October 29, 1908, and ask you if that is the statement referred to in your testimony which I have just read to you.

A. This appears to be a copy of the statement I had in mind; and the entry therein under the title

(Testimony of L. F. Young.)

“supplementary” “notes payable May 1st, 1909, for purchase of Northwestern Co.’s bonds and stock \$100,000,” is what I had in mind. I want to state this fact: this addenda that I have on the first page is, [643—199] in a certain sense, down on the books in that it is a question of journal entries while these matters under the head of “supplementary,” in my judgment, and as my recollection informs me, did not appear upon the books in any form. If I used the word “purchase,” it was more of a matter of description than of actual fact as I understood the transaction. The original statement was made up by Mr. Dingee under date of October 10, 1908. There were two statements: there was a statement of October 10th, but it was substantially the same as this of October 29th—with the exception that this addenda did not appear on it, and these supplementary items did not appear on it. The statement of October 10, 1908, which was prepared by Mr. Dingee or under his direction and given to Mr. Gregg or to Mr. Crocker, did not contain any reference whatever to the notes of the Standard Portland Cement Corporation, which are the subject of this action. I desire to make some explanation regarding that. The reason for my making these statements and delivering them was that I felt there were certain liabilities, contingent or otherwise, that should be brought to their attention. I think I made the statement to Mr. Howard or to Mr. Smith that I considered that mine was a more correct statement than the other one, and contained things that the other

(Testimony of L. F. Young.)

did not contain. I cannot remember that at that time I made any explanation with respect to those particular items which I added.

Mr. OLNEY.—It is admitted that all of the certificates listed in the letter of May 14th, 1908, addressed to William J. Dingee, Crocker Building, City, and signed by D. C. Norcross, secretary, were indorsed in the manner in which it already appears in evidence that certificate 51 is indorsed.

The WITNESS.—(Continuing.) It is the fact that all of the Howard stock, so to speak, was canceled on May 25, 1908. There were two kinds of stock dealt with: one set of certificates [644—200] covered what was known as the bonus stock, and the other set of certificates covered what was known as promotion stock; and the bonus stock was one for one with the bonds, or 10 shares for each \$1000 bond. The promotion stock was just what Mr. Howard received from Mr. Dingee and Mr. Bachman in the promotion of the company; it was supposed to be certificate No. 11 for 9,000 shares. The letter of May 14th, 1908, shows a return of 8,900 shares. The book shows that certificate No. 11 was transferred to Mr. Howard or people who are here designated as his friends. I was not present at the time of the issuance of that stock. As to whether this certificate No. 11 issued in Mr. Losh's name as trustee, was ever in the possession of Mr. Howard, the only information I have is from the stock book itself. It was all prior to my association with the company.

The MASTER.—Did you satisfy yourself on the

(Testimony of L. F. Young.)

question of that deed we talked of this morning, Mr. Olney?

Mr. OLNEY.—The deed is in evidence; it is dated April 30th, 1908. This letter which brought up the matter of the deed was dated in 1909. I don't know just what the situation was. This much is apparent, however, that in 1908, at the time of this transaction, a deed was made and the note was given. At that time the entry had been passed to patent in the Government land office, but the patent had not yet issued. Subsequently the patent was issued and apparently the letter in 1909 was written at the time the patent issued—subsequent to this deed. I would like to ask Mr. Howard this question. Mr. Howard, was any second deed given at all?

Mr. HOWARD.—Only the one deed.

Mr. BROBECK.—That deed is in evidence, is it not?

Mr. OLNEY.—Yes, the deed is in evidence.

The MASTER.—Mr. Young hands me an unrecorded deed dated April 30, 1908, and acknowledged May 4, 1908. It is not [645—201] marked as in evidence.

Mr. OLNEY.—I looked it up this morning, your Honor, and found it was in evidence.

Mr. BROBECK.—Can you tell us, Mr. Young, from whom you received this deed?

A. I received the deed, together with some form of a receipt, from William J. Dingee. He handed me the deed and told me to keep it unrecorded until he instructed me to record it. He has never in-

(Testimony of L. F. Young.)

structed me to record it, and I have kept it ever since. I testified that about the time these transactions were occurring Mr. Dingee discussed with me the fact that the Santa Cruz Portland Cement Co. was indebted to the Northwestern Portland Cement Company, and also the fact that the Bellingham Bay stock had been pledged, and gave me certain instructions with reference to the straightening out of those transactions on the books, a memorandum of which I produced. I testified that nothing was done with that memorandum. I meant that transaction as he proposed, that the giving of the notes was never carried into execution. As to why nothing was done in carrying out that matter when this transaction took its present form the occasion for it was gone, he had Mr. Evans off his back. When he succeeded in making this arrangement with Mr. Howard and his friends then the matter of fixing these other transactions dragged along and was forgotten. That other matter was under consideration by him just about the same time that this Evans matter was under consideration by him.

Mr. BROBECK.—Your Honor was kind enough the other day to call to the attention of counsel certain entries in the transcript purporting to represent the manner in which these certificates of stock were endorsed, and which by reason of the arrangement of the matter in the transcript was rather misleading and suggested a correction. Nothing has appeared of record since that time to indicate [646—202] that correction.

(Testimony of L. F. Young.)

The MASTER.—Well, as a matter of fact, I have corrected them with a pen in the original record.

Mr. BROBECK.—Yes, I have no doubt but that your Honor has. I was going to suggest at this time that we hand the Reporter the certificates and permit him to copy in the arrangement in which they appear on the back of the certificates—the endorsement referred to.

The MASTER.—Very well; that may be done. That is to say, you want to have it so that the lines will appear separately just as they are on the certificate?

Mr. BROBECK.—Yes, sir, and with the punctuation as it there appears.

The MASTER.—Will it be necessary to copy them all in, or do you only want to have one copied?

Mr. BROBECK.—Under the stipulation we have just entered into the copying of one form will be sufficient to meet the needs of the record. The Reporter can copy in one of each form.

Mr. PRINGLE.—Certificate No. 51 represents the Promotion Stock. Certificate No. 54 represents the Bonus Stock.

(The endorsements on Certificate No. 51 read as follows:)

“Transfer to the order of William J. Dingee.
May 9,/08.

(These four lines
of writing are in ink.)

JOHN L. HOWARD, Trustee.”

(Testimony of L. F. Young.)

“Transfer to L. F. Young, Trustee,

WILLIAM J. DINGEE,

By L. F. YOUNG, (In ink)

His Attorney in Fact.” [647—202a]

(The endorsements on Certificate No. 54 read as follows:)

“For value received I hereby assign the within certificate to the Standard Portland Cement Corporation.

JOHN L. HOWARD,

Trustee. (In ink.)

Sig. O. K.

D. C. NORCROSS.” (In ink.)

“Transfer to L. F. Young, Secretary.

STANDARD PORTLAND CEMENT CO.

By L. F. YOUNG,

Secretary.”

The WITNESS.—(Continuing.) I testified that I was instructed to return these bonds received through Mr. Howard’s office into the treasury of the Northwestern Portland Cement [648—202b] Company. Mr. William J. Dingee gave me those instructions.

Recross-examination.

Mr. OLNEY.—Q. You testified, Mr. Young, that Mr. Dingee handed you the deed of Mr. Howard to the Standard Portland Cement Corporation. I call your attention to this language in the letter of May 4th, 1908: “I will also deliver you a deed for certain property which stands in the name of John L. Howard.” I ask you if that refreshes your recollection

(Testimony of L. F. Young.)

as to how you received it?

A. No. I will say that Mr. Dingee handed it to me, for the reason that he gave me the certificate with it, which certificate I later returned to Mr. Howard. My recollection is I received two papers at that time. Some months later, possibly 1909, Mr. Howard obtained from me the certificate of the land office for this land. I don't know what his purpose was. I know he did obtain a certificate from me. My recollection of it is that the purpose for which he obtained the certificate was to surrender it and receive the patent. I had a memorandum made at the time which says something to that effect. I find a letter under date of June 7, 1909, which I wrote to Morrison, Cope and Brobeck relating to that subject. I have a copy of their reply. And following that letter, I sent the certificate to Judge Cope, and he delivered it to Mr. Warren Olney, Sr.; subsequently I received from Mr. Howard the patent which is here in evidence. There was no other or further deed received by me. This refreshes my memory to a certain extent as to whether or not I received the certificate at the same time. I say here I cannot remember whether I received the certificate at the same time that I did the deed, but I state that I received the deed from Mr. Dingee. The date of that letter is June 7, 1909.

I made no explanation at the time I delivered to Mr. Gregg the statement of the Standard Portland Cement Corporation, [649—203] of the item there relative to \$100,000 in notes for the purchase of the

(Testimony of L. F. Young.)

Northwestern stocks and bonds. And as to whether I had any conversation with Mr. Gregg at that time about it, I think I just handed him the statement. I had, I know, a conversation with Mr. Gregg referring to these notes. I may have spoken to a great many people about the office concerning them. I am trying to think whether my conversation with Mr. Gregg was at the time you brought suit. However it came to his attention in some manner and he sent for me and asked me. It may have been about the time you brought suit—it was some while after the 18th of November, 1908. It may have been 6 months or 8 months. They came to his attention evidently through somebody, I don't know who. So he sent for me and asked me how about these notes; he had never heard of them before. I then called his attention to the fact that he had a copy of this addenda. In substance that is all of the conversation between me and Mr. Gregg at the time. He seemed to have information about these notes. He had been talking to somebody about them at the time. It may have been Mr. Cameron, the president of the company. He said, "This is like a clap of thunder out of a clear sky. I never heard of these notes before; what are they? Why didn't you tell me about them?" I did not think the details of the circumstance were then discussed. I may have discussed the matter with some other officers of the corporation at that time, with Mr. Cameron. I presume I acquainted him with the nature of the transaction. I undoubtedly have prior to the time they came due,

(Testimony of L. F. Young.)

I think. Mr. Cameron was president of the company, and it was after that talk with him about it that we wrote this letter to Mr. Dingee disclaiming liability, which was written the day the notes became due, or about that time.

On May 25th, 1908, the stock of the Northwestern Portland Cement Company which with the bonds of that company was delivered [650—204] to me by Mr. Norcross on May 6, and 7th was by me, under Mr. Dingee's instructions, canceled, and reissued in my name as secretary. I don't think that the new certificate was ever torn out of the book. I think it stayed right in the book—yes, it was torn out. I do not remember what I did with it. It was canceled by my successor. He may have torn it out. I think it was left in the book. I frequently did that in a good many cases. They were not torn out at all. They were just simply written out and left in the book. It appears from the stock book that in many cases a certificate was made out and not detached from the stub; but in this particular case and in others the certificate had been detached from the stub. Certificate No. 200 for 900 shares was turned out, and pasted back again when it was canceled. Mr. Cole was secretary at the date of its cancellation, and he signed it as secretary in canceling it, not as assistant secretary. It was on December 24th, 1908. I think I went out before that. I could not say positively that when it was transferred to my name as secretary the certificate was torn out of the book or left in the book.

(Testimony of L. F. Young.)

In the ledger of the Northwestern Portland Cement Co., which you hand me, the capital account appears on page 9. I find no entry here except there is supposed to be the sum of \$4,499,500 credited on August 27th, 1906, and \$500 on the same day. That is the only item that appears in the book. This book was never kept in the form which would show the items corresponding or that would correspond to a cancellation of an outstanding stock. These two items are all there are in that book on that page in the Capital Account. I cannot say any more only that those are the only two items aggregating \$5,000,000. As to whether that is the only page on which the Capital Account appears, that is the only entry I have found so far, or know anything about. I do not see how I can say yes or no to the question as to whether [651—205] there is anything whatever on the books of the Northwestern Portland Cement Company that would show or indicate that this stock which on May 25th, 1908, was put in my name as secretary was as a matter of fact in my name as secretary of the Northwestern Portland Cement Company, and was the treasury stock of that company. I am not familiar with this book, but I know of no page in it or any heading where are any items of treasury stock or any stock is kept other than page numbered 9, which I read. The stock transaction to my knowledge was kept in this manner. When this plant was promoted, I understood that the entire capital stock was turned over to Irving A. Bachman in exchange for his agreeing to furnish certain prop-

(Testimony of L. F. Young.)

erties—whatever that transaction was—and in order to promote the bonds, he turned back out of his holdings into the treasury stock which was supposed to represent treasury stock, as stock that was supposed to come from that source. I have no other information with regard to stock owning or stock holding of this company. As to whether there were any memorandums made or entries made in the records or books of the Northwestern Portland Cement Company at the time that this stock was put in my name as secretary which would indicate that it was treasury stock or would indicate that the amount represented by that certificate had been canceled and the capitalization of the company reduced by that amount, I will answer broadly by saying other than the certificate stock book *which of no entry* of any treasury stock, other than the mere fact that it stood in my name as secretary, and in the names of my predecessors and successors. Some of the treasury stock that I hold as treasury stock did stand in the name of my predecessor. This certificate was made up of stocks that had been returned, endorsed to the Standard Portland Cement Corporation. It must have been in the same [652—206] class as the other treasury stock. As to whether there was any memorandum or writing or record which would indicate that that was treasury stock, other than the mere fact that it stood in my name as secretary, other than the answers I have already given, I have no knowledge of it. I have stated, Mr. Olney, that I know of no memorandum of any treasury stock be-

(Testimony of L. F. Young.)

ing kept at any time, other than as appears in this certificate of the stock book and the stock that stood in my name as secretary was in my judgment treasury stock. Beyond that I have no information. I gave no instructions at that time or at any other time in relation to treasury stock. The bond account appears at page 12 of the ledger of the Northwestern Portland Cement. I have never gone over these items. I find credit items in lead pencil aggregating \$305,000. The impression that is conveyed to me by that column, the summation is that it represents bonds that have been sold. I presume it is. I do not keep the books, but that is the way I would keep them. There are five entries aggregating \$21,000 in the debit column. April 24, 1907, error journal six, \$100,000; 1908, April 25, 1 bond, and in lead pencil, Wilson journal 24, \$1,000; the same day 1 bond Reiter, the same journal page, \$1,000; 1909, Feb. 16, 4 bonds, Churchill journal 35, \$4,000; May 3, 5 bonds, Irving A. Bachman, 228-232, inclusive, returned journal 43, \$5,000. Those are all the debit entries appearing on page 12, page 12 apparently being the only page for the bonds. I wish to state that none of the entries of this book are in my handwriting, or with my personal knowledge. I only gathered it from the books. There is not that I am aware of, or remember, any record or memorandum made at the time of the return of the bonds to the treasury of the Northwestern Portland Cement Co., which would indicate that they had been canceled and were no longer outstanding. I did not give

(Testimony of L. F. Young.)

directions for any such entry. I was looking over the ledger account one day last week, [653—207] and I did not see any entry made at or about this time on the books of the Standard Portland Cement Corporation charging the Northwestern Portland Cement Co. with liability by reason of the transaction by which these stocks and bonds were canceled and retired. According to the books of the company, before this so-called series of reversible entries was made by Mr. Dingee, the Santa Cruz Portland Cement Company at this time was owing the Northwestern Portland Cement Company an amount in excess of \$100,000; in April and May, 1908, this was the situation. They do not show it at the present time. The trial balance is correct, and I understand that that shows certain figures. Whatever the fact is. I am not disputing the fact, but I have forgotten the figures. Complainant's Exhibit 11 shows that there was due the Northwestern Portland Cement Company \$103,233.33, and the Standard Portland Cement Corporation was also indebted to the Northwestern in the sum of \$69,050.00.

I had no intention at any time to be a party to any conspiracy or arrangement to defraud the Standard Portland Cement Corporation. While I acted at the request of Mr. Dingee in turning over to the Northwestern treasury the stocks and bonds, I was the officer of the Standard Portland Cement Corporation. I took the bonds down in the treasury. I have them yet. I was the one who made the transfer in the books of the certificates and the stock. I have

(Testimony of L. F. Young.)

held the actual possession of the bonds ever since they were delivered to me by Mr. Norcross. Neither the Standard Portland Cement Corporation nor anybody else has ever made any demand on me for these bonds; neither the Standard Portland Cement Corporation nor anybody else, to my knowledge, has ever done anything to secure the possession of either the bonds or the stock. I will state this, that I am ready, willing and anxious to deliver these bonds at any time to anybody who is the real owner and I [654—208] hold them for that purpose.

Q. I call your attention, Mr. Young, to the following items appearing in the Wenzelburger report: "Irving A. Bachman, debit balance \$5,000, due for bonds held by the company as collateral. Edward McGary, deb. balance \$2,000, due for bonds held by it as collateral. E. W. Churchill, \$4,000 balance due on bonds held by the company as collateral." I will ask you if any of the debit items were ever paid to the Northwestern Portland Cement Company.

A. I know nothing about that transaction other than looking at the journal here in court, the other day I noticed, I believe, that these bonds were returned when the indebtedness was canceled and wiped out by the return of the bonds. I know that bonds to that extent has been returned. There were \$11,000 in bonds returned to the company and that amount canceled.

I am acquainted with the transaction appearing in the minutes of the meeting of the Board of Directors of the Standard Portland Cement Corpora-

(Testimony of L. F. Young.)

tion held on Feb. 10, 1909, relative to the waiver of the statute of limitation. I remember that in February, 1909, there came up between the Standard Portland Cement Corporation and the Northwestern Portland Cement Co. the matter of the claim of the Northwestern Portland Cement Company against the Standard Portland Cement Corporation.

Q. In that transaction the Northwestern Portland Cement Company advanced a claim against the Standard Portland Cement Corporation, did it not?

A. Well, that is the form of the resolution we issued for all the companies. I do not remember of the Northwestern Portland Cement Company advancing any specific claim against the Standard Portland Cement Corporation at that time. As to whether the Northwestern Portland Cement Company made a [655—209] claim at that time that there was money due from the Standard Portland Cement Corporation to it—that transaction grew out of a different set of circumstances. I remember nobody for the Northwestern Portland Cement Co. advancing a claim, although I know that they had claims against the Standard.

Q. That claim of the Northwestern Portland Cement Co. was questioned to some extent by the Standard Portland Cement Corporation, was it not?

A. There is a statement at the end of that, a waiver that this shall not be to the prejudice of any claims or offsets which either side claimed against the other.

(Testimony of L. F. Young.)

It was merely as to the question of the statute of limitations.

Mr. OLNEY.—I will offer in evidence this resolution which was adopted at this time by the Board of Directors of the Portland Standard Cement Corporation—on February 10, 1909.

Mr. BROBECK.—What is it about?

Mr. OLNEY. —It relates to the accounts between the Standard Portland Cement Corporation and the Northwestern Portland Cement Company.

The WITNESS.— It is a waiver of the statute of limitations.

The MASTER.—You may read it, Mr. Olney.

Mr. OLNEY.—It appears in the minute-book of the Standard Portland Cement Corporation, beginning about the middle of the page 88, and running over to page 89 and the top of page 90.

“Thereupon, on motion of Director Morrison, seconded by Director Berry, the following resolution was unanimously adopted:

WHEREAS, the Northwestern Portland Cement Company claims to have divers demands, claims, rights and causes of action against this corporation (the Standard Portland Cement Corporation) for moneys and property of said Northwestern Portland Cement Company said to have been received by this company, and on other accounts, and

WHEREAS, this Company and said Northwestern Company cannot now reach any agreement with respect to said demands, claims, rights and causes of action; and [656—210]

WHEREAS, said Northwestern Company is willing to agree not to press said demands by suit or for payment or other enforcement prior to July 1, 1909, if, and in consideration of an agreement of this Company that it will not plead any statute of limitations against any of said demands, claims, rights and causes of action, in the event said Northwestern Company should be required hereafter to bring or maintain any action or actions upon said demands, claims, rights and causes of action, or any of them, but on the contrary, in consideration of the forbearance aforesaid, this Company will waive all statutes of limitations which it might plead against said demands, claims, rights and causes of action, or any of them, reserving, however, to itself the right to dispute and question the validity of all of said demands, claims, rights and causes of *of* action whenever and wherever the same may be asserted on any and all grounds available to it, save only the statute of limitations; and

WHEREAS, said Northwestern Company has by resolution having the force and effect of an agreement upon its part, undertaken, in consideration of an agreement upon the part of this corporation, to the foregoing effect, that it will forbear until July 1, 1909, to press by suit or for payment or other enforcement, any and all demands, claims, rights and causes of action which it may now have against this company.

NOW, THEREFORE, this Company does hereby agree, in consideration of the foregoing agreement on the part of the Northwestern Portland Cement

(Testimony of L. F. Young.)

Company, not to plead any statute of limitations against any demand, claim, right or cause of action which said Northwestern Portland Cement Company may have against this company, but on the contrary this Company agrees that it will, and it does hereby, waive all statutes of limitations which it might plead against said demands, claims, rights and causes of action against said demands, claims, rights and causes of action, or any of them, reserving, however, to itself the right to dispute and question the validity of all of said demands, claims, rights and causes of action, whenever and wherever the same may be asserted, on any and all grounds available to it, save only the statute of limitations.

Be it further resolved, that the passage of this resolution shall itself constitute a contract on behalf of this corporation, without the execution of any formal papers in the name of this corporation, or on its behalf; and

Be it further resolved, that a certified copy of this resolution be delivered to the Northwestern Portland Cement Company, and that said Company be requested to signify its consent thereto by resolution duly adopted."

The WITNESS.—(Continuing.) That is what I was getting at, each company—the Standard Portland Cement Corporation, the Northwestern Portland Cement Company, the Atlantic Portland Cement Company, the Santa Cruz Portland Cement Company—all adopted a similar resolution relating to each other. Mr. Dingee has gotten these

(Testimony of L. F. Young.)

companies in such a combination that we did not want the statute [657—210a] of limitations to run and we had all the companies adopt a similar resolution. I believe that such a resolution was adopted on the part of the Northwestern Portland Cement Co. I have one from each company. I believe I have a copy of it. As to whether any claim was asserted by the Standard Portland Cement Corporation at this time against the Northwestern Portland Cement Co., my recollection is that all the companies did this with relation to each other. It is certain, as I said, that each company passed this series of resolutions, but I see nothing in the resolution you show me now except that it is a claim against the Standard. This simply waives the statute of limitations in that respect. I find nothing in this resolution whereby it would appear that the Standard Portland Cement Corporation has advanced any claim against the Northwestern Portland Cement Co. I have no knowledge of any such resolution now. All these resolutions that I testified were passed by the various companies, were passed at or about the same time—within a month, I should say. I find in the minute-book a meeting December 1st, 1908.

Q. The next meeting is February 8, 1909, and there you do find a resolution, do you, with reference to the claim of the Northwestern against the Standard, but no reference to any claim by the Standard against the Northwestern?

A. I see no such reference. The next meeting is May 3d, 1909. I see no reference in that meeting

(Testimony of L. F. Young.)

to any claim of the Standard against the Northwestern. There is only one subsequent meeting, and that does not seem to be anything but resignations and changing the officers and the offices. I do not know of any claims presented against the Northwestern Portland Cement Company by the Standard Portland Cement Corporation, by reason of the purchase of the stock or bonds in April and May, 1908, for which the Standard Portland Cement has notes.
[658—210b]

Mr. BROBECK.—We offer in evidence the letter of June 7, 1909, written by L. F. Young, Secretary of the Standard Portland Cement Corporation to Messrs. Morrison, Cope and Brobeck, and connected letters.

Thereupon said letters were received and read in evidence in the above-entitled action and are in words and figures as follows, to wit:

“STANDARD PORTLAND CEMENT CORPORATION,

Crocker Building.

San Francisco, Cal., June 7th, 1909.

Morrison, Cope & Brobeck,

Attorneys at Law,

Crocker Building,

San Francisco, Cal.

Gentlemen:

About the month of May, 1908, Mr. William J. Dingee, who was at that time the Vice President of the Standard Portland Cement Corporation, handed

me a deed executed by John L. Howard, and Helen L. Howard, (his wife), to the Standard Portland Cement Corporation for a tract of land in Whatcom County, State of Washington, described as follows:

West $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Section No. 23, in Township 40 North of Range No. 5 East, Willamette Meridian.

This deed was dated April 30th, 1908, and was acknowledged May 4th, 1908 by Mr. Howard and his wife, before M. V. Collins, Notary Public in this City and County.

This deed has never been recorded. At the time Mr. Dingee handed it to me, he said that I should hold it awhile, and that he would tell me when it should be recorded. As I have never received any further information on this subject, I have never had it placed of record.

Mr. Dingee handed me receipt #21306 of the Receiver's Office, Seattle, Wash., dated June 27th, 1907. I have no recollection as to the date this receipt was given to me, whether it was before or after I received the deed.

I am enclosing herewith for your inspection both the deed above referred to and the Receiver's receipt.
[659—211]

About three weeks ago, Mr. Norcross, Mr. Howard's secretary, asked me over the telephone if I had this Receiver's receipt. I told him that I had, and upon his coming to this office I showed him both the receipt and the deed.

Mr. John L. Howard called at the office of the Cement Company this morning about 10 o'clock and wished me to deliver him this Receiver's receipt in

order that he might send it to Washington and exchange it for the patent of the lands, which patent, he informs me, is now ready for delivery upon the surrender of this receipt.

I asked Mr. Howard why this deed was made to the Standard Portland Cement Corporation, when the property bought was in reality property which effects only the Northwestern Portland Cement Company and also asked him what the consideration for this deed was. He replied that the deed was made in this manner at the request of Mr. Dingee, and that Mr. Dingee had given him the note of the Standard Portland Cement Corporation, dated May 1, 1908, payable one year after date, for \$1,800.00. Mr. Howard said that this sum of \$1800 represented personal costs and expenditures made by him in connection with the location and purchase of this property, and had, nor has, nothing whatsoever to do with the \$100,000 bond transaction upon which the recent suits against the Standard Portland Cement Corporation have been predicated.

I told Mr. Howard that the books of the Standard Portland Cement Corporation show no note of \$1800 outstanding, payable either to himself or to his wife, Helen L. Howard, nor is there any resolution upon the minutes of these companies authorizing the purchase of this property, or the execution of this note.

I told Mr. Howard that it would appear to me that he should have made this deed to the Northwestern Portland Cement Company, and should have received the note of the Northwestern Company. I [660—211a] further told him that I had no desire or inten-

tion to do any act to hinder the completion of his transaction, or the adjustment of any matters pending between those companies and himself, but that I did not like to do any act that might be construed as a ratification of any acts or transactions or agreements entered into by and between him and the former management of this corporation.

Mr. Howard informed me that this was a separate transaction, not related to any other, and that any arrangement made to adjust this particular matter and to pay the note of \$1800 referred to, would not ratify or confirm or conflict with the \$100,000 bond transaction in any way.

Before delivering this receipt to Mr. Howard, and before I take any steps in this matter, I would like to have your advice.

Yours very truly,

L. F. YOUNG,

Secretary.

Dict. LFY/GD."

The next is a letter of June 11, 1909, addressed to L. F. Young, Secretary of the Standard Portland Cement Corporation and signed by W. B. Cope, and reading as follows:

"June 11, 1909.

L. F. Young, Esq.,

Secretary Standard Portland Cement Corporation,

Crocker Building, San Francisco.

Dear Mr. Young—

Yours of the 7th inst. addressed to our firm has

come to my hands on account of the absence of Mr. Morrison. From your statement of the facts I am of the opinion that it would be unwise to surrender the receipt without more definite knowledge as to the nature of the transaction.

Referring to the suits that have recently been brought against the Standard would say that the plaintiff's attorney is rather insistent that we should put in a pleading and for that reason it would be advisable for us to take the matter up at an early date.

Yours very truly." [661—211b]

Then, under the same date, and on the letter-head of the Santa Cruz Portland Cement Company, a letter from L. F. Young addressed to Messrs. Morrison, Cope & Brobeck, reading as follows:

"SANTA CRUZ PORTLAND CEMENT COMPANY,

Crocker Building.

San Francisco, Cal. June 11th, 1909.

Morrison, Cope & Brobeck,

Attorneys at law,

Crocker Building, City.

My dear Judge Cope:

I am enclosing herewith the Receiver's Receipt, Seattle, Wash., #21306, concerning which I wrote you a few days ago, and concerning which we had our conversation this afternoon. This Receipt I understand, you are to deliver to Mr. Olney, Attorney for Mr. John L. Howard, for the purpose of enabling Mr. Howard to procure a patent on the lands in the

Receipt referred to.

This delivery to Mr. Olney is to be made without prejudice to any of our rights in any matters pending between Mr. Howard and his companies with the companies in which we are concerned, directly or indirectly.

Yours very truly,

A. F. YOUNG.

Dict. LFY/GD.

Enc."

Then, under date of June 11, 1909, a letter by W. B. Cope, addressed to Warren Olney, reading as follows:

"June 11, 1909.

Warren Olney, Esq.,

San Francisco, California.

Dear Sir:

Referring to the request of Mr. John L. Howard to the Standard Portland Cement Corporation for the delivery to him of a receipt, No. 21,306, issued by the Receiver of the United States Land Office at Seattle, Washington, for a tract of land described as the West $\frac{1}{2}$ of SW. $\frac{1}{2}$ of Section No. 25 in Township 40, North of Range No. 5 East, Willamette Meridian, containing 80 acres, situated in Whatcom County, Washington, I beg to say that Mr. Young has referred the matter to me in the absence of Mr. Morrison, who has had personal charge of the affairs of the Standard Portland Cement Corporation. I am so completely ignorant of the affairs of the company that I dislike to give advice with the opportunity for

(Testimony of L. F. Young.)

careful consideration. In this matter, however, I will take the responsibility of delivering the receipt to you upon your assurance that the surrender of the receipt shall not in any way adversely affect the rights or interests of the Standard Portland Cement Corporation or any of the companies with which we are concerned. The receipt is enclosed herewith. Kindly confirm this letter and oblige,

Yours very truly.

WBC/M."

Mr. BROBECK.—Q. Yesterday, in response to a question [662—211c] by Mr. Olney reading as follows: "Has the Standard Portland Cement Corporation to your knowledge ever done anything to secure the possession of either the bonds or the stock?" you answered, "No, nobody has, to my knowledge. I will state this, that I am willing and anxious to deliver these bonds at any time to anybody who is the real owner, and I hold them for that purpose." What meaning did you intend to convey by that answer, Mr. Young?

A. I thought that perhaps Mr. Dingee might complete the transaction as I understood it was made—might take up the notes and demand the bonds himself or they might belong to the Northwestern Portland Cement Co. When I received these bonds, Mr. Dingee instructed me to put them in the treasury of the Northwestern Portland Cement Co. The Standard Portland Cement Corporation has never, to my knowledge, asserted any title to these bonds or suggested to me that I held them subject to any right

(Testimony of L. F. Young.)

which they might have to them.

Q. Has there ever been any question in your mind as to whether you held those bonds to the order of the Standard Portland Cement Corporation?

Mr. OLNEY.—We object to that upon the ground that it is incompetent and immaterial and calling for the opinion and view of the witness.

The MASTER.—The objection is sustained.

Mr. BROBECK.—We note an exception.

Q. Have you ever regarded the Standard Portland Cement Corporation as in any manner the owner of those bonds?

Mr. OLNEY.—We object to that upon the same grounds.

The MASTER.—The objection is sustained. The witness may answer.

Mr. BROBECK.—We take an exception.

The WITNESS.—A. I have not. When I became the secretary of the Northwestern Portland Cement Co. the treasury stock of that corporation was carried in the name of Samuel A. [663—212] Boyd, secretary. When I became secretary the treasury stock of the company was transferred to my name, L. F. Young, secretary; and when I ceased to be secretary of the Northwestern Portland Cement Co. the treasury stock went into the name of Walter H. Cole, secretary. From the stock journal it appears that on Dec. 24, 1908, certificate No. 199, for 9150 shares, certificate No. 200, for 900 shares, and certificate 201, for 5710 shares, which stood in my name as secretary, were cancelled, and a new certificate No. 207, for

(Testimony of L. F. Young.)

15,760 shares, was issued in the name of Walter H. Cole, secretary. Before I became secretary, during the entire time that I was secretary and after I ceased to be secretary, the treasury stock of the Northwestern Portland Cement Company was carried in the name of the secretary of that Company.

Recross-examination.

The WITNESS.—From that tabulated statement which is in evidence I can show you as of any period what was the amount of the treasury stock of the company, other than this stock which I received from the bondholders through Mr. Howard. Certificate No. 10 was for 9,000 shares, certificate No. 11 was for 9,000 shares. I presume they represented all of the treasury stock. I see that certificate No. 12 is for 750 shares, and No. 13 is for 750 shares. I think they eventually went back into the treasury, so it must have been all of the stock other than 14 and 15. But the certificate which I have dealt with as being the treasury stock was say certificate No. 10 for 9,000 shares when I went into the company, that certificate had been reduced to 6,100 shares, and that certificate is the one I dealt with as treasury stock. At the time of the formation of the company all of the stock was issued to Mr. Bachman, 49,995 shares, and 5 shares were given to the directors to qualify them; then certain amounts of it were put in the name of Mr. Losh as trustee. Strictly, as treasury stock, I have considered only No. 10 for 9,000 shares. No. [664—213] 11 for 9,000 shares, I presume, if Losh

(Testimony of L. F. Young.)

was trustee for Mr. Dingee and Mr. Bachman, they issued that for bonus. I will state this as the reason why I considered only No. 10 as treasury stock. When I went into the company certificate No. 11 for 9,000 shares had been entirely used up or given out and the only certificate that I had was a decreased certificate No. 10; it was then 6,100 shares. I considered that that was the treasury stock, and that was all. As the result of the offer of Mr. Bachman to convey to the corporation the properties which he had acquired in Whatecom County, he received 49,995 shares of the fully paid-up stock of this corporation, the other five shares going to qualify the directors. Thereafter the bond *issued* having been authorized and the company desiring to provide a bonus for the bonds, Bachman agreed to return to the treasury of the company 9,000 shares of stock, being one for one or 900 bonds which it was then contemplated they would sell. There were then surrendered to the company by Bachman the 9,000 shares which were intended to be used as bonus stock, but whether he surrendered also another 9,000 shares to the company or not, I do not know. The original certificate issued to Mr. Bachman was cut up so that two certificates of 9,000 shares each were taken out and each of these certificates were issued in the name of the secretary of the company, Frank Losh, as trustee. Out of one of these certificates amounting to 9,000 shares, the bonus stock which went in the sale of these bonds was carved; and the other 9,000 represented by the other certificate was in fact the 9,000

(Testimony of L. F. Young.)

shares which Mr. Howard received, a promotion stock of that company. When I became secretary, they had disbursed from the 9,000 shares, certificate 2,900 shares; in other words, 10 shares each for 290 bonds; and there remained in the treasury then of this bonus stock 6,100 shares. When these bonus shares came back they were restored to the name of the secretary [665—214] as treasury stock—they were put in my name as secretary. Acting on the instructions of Mr. Dingee that those shares be placed in the treasury of the Northwestern, they were by me placed in my name as secretary of the Northwestern.

Mr. DUNNE.—We rest, your Honor.

And be it further remembered that thereupon JOHN L. HOWARD was recalled as a witness for and on behalf of plaintiffs and respondents, and testified as follows, to wit:

[Testimony of John L. Howard, for Plaintiffs and Respondents (Recalled).]

Direct Examination.

Mr. OLNEY.—Q. Mr. Howard, will you state to the Court what evidence of lime deposits there were on the ground in Washington which was finally acquired by the Northwestern Portland Cement Co.?

Mr. DUNNE.—We object to that as immaterial, irrelevant and incompetent, and without foundation, in this, that it is not shown that the witness is competent, and further that it is not a proper subject matter in any event for statement by the witness, he

(Testimony of John L. Howard.)

not having been known to have been experienced in the line to which the inquiry is addressed. I understand Mr. Howard's testimony to be that he is a general merchant, not a geologist or an expert on any of these matters, and that he was not actually on the spot. I make the objection that there is no foundation, it not appearing that the witness is competent to speak upon such matters.

The MASTER.—The objection is overruled.

Mr. DUNNE.—We note exception.

A. I saw the limerock ledge on the side of the mountain above me.

Mr. OLNEY.—Q. What was its extent?

Mr. DUNNE.—We object to that upon the ground that there is no foundation laid in this, that it does not appear that he knows. [666—215]

The MASTER.—The objection is overruled.

Mr. DUNNE.—We note an exception.

A. Simply very large. I have no dimensions either as to the exact height or exact width.

Mr. OLNEY.—Just describe in general terms how the lime deposits there appeared to you as you could see them particularly in regard to their extent and size.

Mr. DUNNE.—May it be stipulated that we have the same objections on the same grounds heretofore stated, and the same ruling and exception?

The MASTER.—Yes.

The WITNESS.—A. It was a very steep hillside. It covered, in so far as we went on, an imperfect trail with small broken rock. It was the fatigue of

(Testimony of John L. Howard.)

climbing up that rock that made us stop. Above us on the hill you could see the immense deposit of limerock very clearly exposed. I did not go to the face of the rock itself. The deposits exposed were very large.

Since my previous examination I have ascertained my movements during the months of March, April and May, 1908. I left for New York on Mar. 2d, 1908, and returned from Washington on March 21, 1908. I left on May 10, 1908, for Portland and went from Portland via Nanaimo to the east, and returned from Washington on the night of June 2d.

The date on which I finally came to an understanding with Mr. Dingee that I would not cancel the sales contract was February 26, 1908. With reference to "Complainant's Exhibit 16," being a draft by the Santa Cruz Portland Cement Company on the Western Building Material Company, dated March 28, 1908, and accepted by the Western Building Material Company, I have no recollection of any of the circumstances in connection with that acceptance or with that draft other than what this transaction [667—216] shows. There were a great many acceptances given during that year.

Q. Did these acceptances or any other acceptances by the Western Building Material Company in favor of either the Standard Portland Cement Corporation or the Santa Cruz Portland Cement Co. having anything to do or play any part in connection with the sale of the bonds of the Northwestern Portland Cement Co. involved in this transaction?

(Testimony of John L. Howard.)

Mr. DUNNE.—That is objected to as immaterial, irrelevant and incompetent, calling for the opinion and private judgment of the witness, and upon the ground that the witness has already testified that he has no recollection as to anything else affecting these acceptances except what appears on the paper itself.

The MASTER.—He said that as to this particular acceptance the objection is overruled.

Mr. DUNNE.—We note an exception.

The WITNESS.—A. Absolutely nothing. As to the testimony of Mr. Young that he has seen the letter of Mr. Evans to myself dated March 4, 1908, in Mr. Dingee's possession, I have no recollection of sending the letter to Mr. Dingee, but if that letter was in his possession, I must have sent it from New York while I was there—mailed it to him. As to having any conversation with Mr. Dingee prior to the fall of 1908, with relation to his responsibility, either civilly or criminally by reason of any conduct of his in connection with the Northwestern Portland Cement Company, I did not know of his misconduct until that time, and I talked with him then only about his hypothecating the shares of the Bellingham Bay and British Columbia Ry. Company, and with the exception of such revelation as was made by the Wenzelburger report, which I previously testified I did not discuss with him. Referring to the two interviews I had with Mr. Dingee at which the purchase of the Northwestern [667½—217] stocks and bonds by the Standard Portland Cement Corporation was arranged, as to what proposals or sug-

(Testimony of John L. Howard.)

gestions had been previously made between me and Mr. Dingee for relieving Mr. Evans or any other of my friends from their investments in Northwestern securities, I am quite positive that that is the first time the subject came up between us, when I went to him on the first visit. At that interview, I suggested to Mr. Dingee, or at least I told him that Mr. Evans was here and that these other interested people had met in my office; and they had suggested that I come around and talk with him about relieving them of the investment. His first and immediately proposition was that the Santa Cruz Portland Cement Co. would give its notes for them and he would indorse them. I had no authority from Mr. Evans, Mr. Smith or Mr. Spencer either to make a proposal to Mr. Dingee, or to accept one. I was merely a message bearer. There was not any proposition ever discussed between me and Mr. Dingee relative to the taking up of the bonds and stocks of the Northwestern Portland Cement Company, other than the proposition to which I have testified, first, that the Santa Cruz should purchase the same, and then that the Standard Portland Cement Corporation should purchase the same. After the second interview with Mr. Dingee at which it was arranged that the Standard Portland Cement Corporation should purchase the Northwestern Portland Cement Company's stocks and bonds, I did nothing further in connection with the matter. I simply instructed Mr. Norcross about the details of the transaction and he completed it, gathered together the securities and made

(Testimony of John L. Howard.)

the delivery. I do not remember that I had any further conversation or communication with Mr. Dingee relative to the matter. I left for the east immediately after that.

Q. What knowledge or information did you have as to any intention on the part of Mr. Dingee that the bonds and [668—218] stocks of the Northwestern Portland Cement Company purchased by the Standard Portland Cement Corporation would not be held by the latter Company or were to be turned over to the Northwestern Company?

Mr. DUNNE.—We object to the question upon the ground that it is incompetent in this: that it is an effort to establish the intent of one person by the statements of another. To ask one witness as to what somebody else's intention was in the doing of a given act we submit is not evidence. The question calls for a opinion and not for what Mr. Dingee said to him.

The MASTER.—The objection is overruled.

Mr. DUNNE.—We note an exception.

The WITNESS.—A. The first real knowledge I had was from listening to the testimony of Mr. Young. I had no knowledge or information before that that might be described as real. I did not have any knowledge or information at all before that. I never had any discussions or conversation with Mr. Dingee about this particular point.

Q. What knowledge or information did you have as to the actual disposition of the bonds and stock of the Northwestern that were sold to the Standard

(Testimony of John L. Howard.)

Portland Cement Corporation.

A. The only knowledge I had was the fact of their delivery by Mr. Norcross to Mr. Young. Beyond that, I knew nothing.

Mr. DUNNE.—We move to strike that out, first, on the ground that it calls for the conclusion of the witness; and on the ground, second, that it does not appear that the witness has any original or present knowledge upon that subject, his testimony having been that he left the details of the transaction to Mr. Norcross and went away to the east. He could only acquire [669—219] knowledge of the fact as to which he testifies from hearsay. We move to strike out the answer.

The MASTER.—I will deny the motion.

Mr. DUNNE.—We will note an exception.

The WITNESS.—(Continuing.) I had no interest in the Northwestern Portland Cement Co. or in the disposition of the stock and bonds of the Northwestern Portland Cement Co. which are in controversy here, or rather are involved in this controversy after those stocks and bonds had been delivered to the Standard Portland Cement Corporation. At the meeting which was held in my office when Mr. Evans came from Vancouver, Mr. Sidney V. Smith, who was interested in the bonds and who, I think, at that time, was our counsel—but I am not sure whether he had retired,—gave us such legal advice in the course of the discussions as the case seemed to warrant. I told Mr. Smith all that I knew. My authority to act for Mr. Evans and the other bond-

(Testimony of John L. Howard.)

holders in the matter ended with the completion of this transaction with Mr. Dingee. When I came back to them and they adopted the suggestion of taking the Standard Portland Cement Corporation's note instead of the Santa Cruz Company's, and when they commissioned me to go back and tell Mr. Dingee that the Standard note was acceptable, and when he agreed to give it, that ended it practically, so far as I was concerned. All that remained after that time was simply to gather up the securities and turn them over—detail work. There was no other understanding between me and Mr. Dingee, and none with anybody else, as to this transaction *other than* set out in the certified copy of the resolution of the Board of Directors of the Standard Portland Cement Corporation which has been introduced in evidence and which was given to Mr. Norcross at that time. [670—220]

Cross-examination.

Q. How much time intervened between the two interviews with Mr. Dingee?

A. Mr. Dunne, I have been trying to recall that. My impression is that it occurred during the same day and perhaps in the same half day. They were very close together. I think these gentlemen waited in my office. I am not sure of that. Probably lunch intervened. But I have the impression that I came back from the first interview and made the report and it was discussed then, and I was commissioned to go back and make the reply, and that ended it. I think it was the same half day, but I would not be sure about that.

[Testimony of Sidney V. Smith, for Plaintiffs and Respondents.]

Thereupon SIDNEY V. SMITH was called as a witness on behalf of plaintiffs and respondents, and after having been first duly sworn testified as follows, to wit:

Direct Examination.

I have been a lawyer in San Francisco for a great number of years. I purchased bonds of the Northwestern Portland Cement Co. through Mr. John L. Howard—bonds and bonus stock. I was a party to the interview with Mr. Howard, *together Mr. Evans* and Mr. Spencer, at which Mr. Howard was requested to see Mr. Dingee, relative to my investment in the stocks and bonds of the Northwestern Portland Cement Co. Mr. George W. Spencer was an insurance man; he has since died.

Q. What took place at that interview, as you remember it?

Mr. DUNNE.—We object to the question upon the ground that same is immaterial, irrelevant and incompetent, that the evidence sought to be elicited thereby is hearsay, that the party sought to be charged by that conversation or any representative of such party was present thereat, and that proffered evidence is *res inter alios acta*, and self-serving.
[671—221]

The MASTER.—The objection is overruled.

Mr. DUNNE.—We note an exception.

A. I think that Mr. Evans has correctly described it. It was a meeting amongst some of the persons

(Testimony of Sidney V. Smith.)

who were interested in the bonds of the Northwestern Company for the purpose of determining upon a policy. After the discussions of the situation, the conclusion arrived at was that Mr. Howard should be requested and commissioned to see Mr. Dingee to learn from him what could be done about the bonds and the return of the money which we had paid for them. No proposal or suggestion was made at that interview by Mr. Howard as to what Mr. Dingee would do in the matter. I had no information at that time as to what Mr. Dingee would do. When Mr. Howard, as the result of that interview, went on our behalf to see Mr. Dingee, he was to inquire from Mr. Dingee what could be done for us; the extent of Mr. Howard's authority was only to ask the question and bring back the answer. I had no information or knowledge at any time as to the intention of either the Standard Portland Cement Corporation or Mr. Dingee as to the disposition of the stocks and bonds of the Northwestern Portland Cement Company after their delivery to the Standard Portland Cement Corporation. I first learned of their actual disposition during the hearing before the Master in this case, this present hearing. I had no intent in the transactions other than effecting the sale of my bonds and stocks to the Standard Portland Cement Corporation. The acceptance of the note or notes of Dingee, with or without the indorsement of the Standard Portland Cement Corporation, and any other corporation, any acceptance for our stocks and bonds was not proposed, and therefore it was not

(Testimony of Sidney V. Smith.)

considered. So far as I am aware, the transaction was carried out under my legal advice and supervision. [672—222]

Cross-examination.

I suppose I was known to Mr. Evans at the time of these matters to be a member of the Bar, practicing here in San Francisco. I do not know whether Mr. Evans knew that I was a practicing lawyer or not, at the time when he visited me in March, 1908. In the transactions which already occurred in March, 1908, I gave legal advice to the persons who were present. I think it was Mr. Evans—he may have been joined by Mr. Howard, but at any rate I remember that Mr. Evans requested that as a lawyer I should look into the power of the Standard Portland Cement Corporation to buy the stocks and bonds of another corporation, and that I was also requested by Mr. Evans to draw the necessary resolution and the proper note. I think it was after the final determination that we would sell the bonds and stocks to the Standard Portland Cement Corporation that I was requested by Mr. Evans as a lawyer, to look into the power of the Standard Portland Cement Corporation to purchase the bonds and securities of other corporations. I assume that at that time Mr. Evans did know that I was a lawyer practicing here in San Francisco. Mr. Evans has been in my office. I met him in Vancouver. I have seen a great deal of him, and I think he must have had a suspicion that I was a lawyer. I do not

(Testimony of Sidney V. Smith.)

know anything about whether I represented certain British institutions in which he was likewise interested. I have been counsel for the Bank of British Columbia, for the Canadian Bank of Commerce and for the Bank of British North America. I was at that time a director of the Western Fuel Company, of which Mr. Howard was President; and I was also a subscriber to some of the bonds of the Northwestern Portland Cement Co. through Mr. Howard, and I am financially interested in these various litigations. I am not a party to this litigation, but I am a party plaintiff in the suit in the State court arising out of [673—223] the same transaction—a suit upon my note. Since this present suit was commenced, I have glanced through Mr. Evans' deposition, I have read it over.

Q. That was why you said, was it not, that the interview was correctly described by Mr. Evans?

A. I think Mr. Evans described it on the stand here. Prior to March, April and May, 1908, I know of no relations, contractual or otherwise, between the Northwestern Portland Cement Company and the Standard Portland Cement Corporation.

Q. So far as you know, the only transactions between those two corporations were the transactions involving the stocks and bonds referred to in this litigation; is not that correct?

A. I do not know that that was a transaction between those two corporations. Up to March, April and May, 1908, I do not know of any relations between those two corporations at all. As to whether,

(Testimony of Sidney V. Smith.)

prior to the interviews that were had, I had not talked with Mr. Evans concerning the matters of which he was then complaining, I do not remember of having spoken to Mr. Evans upon the subject until he came to my office and requested me to go to Mr. Howard's office with him for a discussion, which was in March, 1908, but I cannot fix the date. I cannot remember what he did say to me when he came to me on that occasion. I think the conversation was very brief. He simply suggested that a meeting had better be had among some of the persons who were interested in these bonds, and that it would be wise to go to Mr. Howard's office and have such meeting. I cannot remember whether or not he made any reference to the Wenzelburger report. I cannot remember whether he complained at that time about any diversion of the Northwestern Company's funds by Mr. Dingee—I cannot remember whether those [674—224] matters were specifically mentioned or not. As to whether on that occasion he made any complaint to me about the cessation of work at Kendall, Whatcom County, I say I cannot remember the details of the conversation.

I do not think I ever saw the Wenzelburger report. I was told by Mr. Howard of its general character before the visit which Mr. Evans made to me to which we have just been referring, but how long before I cannot tell you. In the interview with Mr. Howard in which reference was made to the Wenzelburger report, it was generally assumed through the whole of that conversation that the work

(Testimony of Sidney V. Smith.)

upon the Kendall plant had ceased, that the promises of Mr. Dingee as to the speedy prosecution of that work had not been carried out and that the scheme had been deferred indefinitely; and that some of the assets—some of the moneys of the Northwestern Company—had been lent to the Santa Cruz Portland Cement Company. I do not recall anything else that was said in that conversation between me and Mr. Howard at the time when he brought to my attention this Wenzelburger report.

The MASTER.—Q. Your answer was in respect to the interview between all the parties down there.

A. Yes.

The MASTER.—I thought that was so, Mr. Dunne. He was talking about what occurred at that interview. As I understand it, Mr. Smith says he does not recall anything about the conversation when he learned of the contents of the Wenzelburger report from Mr. Howard.

Mr. DUNNE.—Q. I will ask you to relate, if you can, the conversation you had with Mr. Howard at the time when the Wenzelburger report was brought to your attention prior to this visit of Mr. Evans' to which you have referred.

A. No, I cannot remember that there was any particular conversation. Mr. Howard and I met daily. We had business together. From time to time the matter of this Northwestern Company [675—225] would come up, and I learned generally in the course of conversations, probably the

(Testimony of Sidney V. Smith.)

general situation.

Q. When Mr. Evans came to consult you or came to your office, was he familiar at that time with the facts and circumstances surrounding or affecting the Northwestern Portland Cement Company's enterprise.

A. I think that we were all at that time practically aware of the condition of things and that condition was assumed among us.

Q. Taken for granted, was it not?

A. We assume that all knew. I have already detailed what it was we assumed, the cessation of work, the temporary deferment of the scheme, and the diversion of some of the moneys of the Northwestern to other corporations allied or controlled by Mr. Dingee. I do not recall whether Mr. Evans made any complaint to me at that time about endeavoring to get information from Mr. Dingee, or having his letters ignored. I do not know what was Mr. Evans' state of mind at that time with regard to Mr. Dingee. He did not give expression to any feeling on his part with reference to Mr. Dingee that I can recollect. I am quite sure that he never said anything in my hearing about prosecuting Mr. Dingee criminally. I have said that I am quite sure that he did not say that. I may add, if you will allow me, that the first interview between Mr. Evans and myself was very short; he came into the office merely to request that I should attend a meeting with Mr. Howard. I cannot recall that Mr. Evans ever visited my office prior to that time. I do not

(Testimony of Sidney V. Smith.)

know just how he came to visit my office on this particular occasion. When Mr. Howard came back at the end of the first interview with Mr. Dingee, he reported that Mr. Dingee had offered to have either of the two corporations, the Santa Cruz Portland Cement Co. or the Standard Portland Cement Corporation, by these stocks and bonds, and issue their notes in payment. No question at all was made at [676—226] that time about Mr. Dingee's ability to produce the notes of either of these corporations.

Q. Is it not the fact that when Mr. Howard came back from Mr. Dingee, at the termination of the first interview, he reported back that Mr. Dingee offered the note of the Santa Cruz Portland Cement Company.

Mr. OLNEY.—The witness has already testified to that.

Mr. DUNNE.—No, he has not; pardon me.

The MASTER.—Yes, I think he has, Mr. Dunne.

Mr. DUNNE.—He has testified, as I understand him, that Mr. Howard came back and reported that Mr. Dingee offered either the note of the Santa Cruz or that of the Standard. Now, I am asking him to probe his memory and see whether what Mr. Howard reported was simply that Dingee offered, not the choice between the two corporations, but the single note of the Santa Cruz Portland Cement Company.

A. My recollection is that we were offered the choice between the two corporations.

(Testimony of Sidney V. Smith.)

Q. Is it not the fact that Mr. Howard, upon reporting to you that Mr. Dingee offered the note of the Santa Cruz, then argued to those present that it would be better to get the note of the Standard Portland Cement Corporation if it could be got, and that upon that argument being made by him he was deputed to return, and the result was that then, and then only, was the choice presented as between the two corporate notes?

A. I recollect no such scene as you suggest.

Mr. BROBECK.—Q. Do you recall any such conversation?

A. I recollect no such suggestion made by Mr. Howard. My recollection of it is that *were* were offered the choice between the two, and that Mr. Howard gave his opinion from some knowledge, or what he assumed to be knowledge, of the affairs and conditions of the two corporations, that the Standard Portland Cement Corporation would be a better corporation to deal with.

Mr. DUNNE.—Q. And thereupon Mr. Evans expressed a preference [677—227] for that note. Is not that so?

A. I think he followed Mr. Howard's suggestion in the matter. The purpose of these notes was to evidence the promise to pay which was the consideration of the sale of these bonds and bonus stock that went with them.

Q. Did Mr. Evans at that time wish to get rid of these bonds?

A. I think that he and all of us were anxious to

(Testimony of Sidney V. Smith.)

sell our bonds and get our money. As to whether Mr. Evans at that time knew that Mr. Dingee was practically insolvent, I do not know what Mr. Evans knew. I don't remember that the financial condition of Mr. Dingee personally was discussed among us. In the conversations which we have been inquiring about I do not think that any other of Mr. Dingee's enterprises were mentioned, save and except the Standard Portland Cement Corporation and the Santa Cruz Portland Cement Co. At the time of these interviews Mr. Evans knew what was the purpose of the bond issue of the Northwestern Co. I do not like to testify as to Mr. Evans' knowledge. I can only answer that by saying that I feel quite sure that Mr. Evans knew what I knew, all of which was perfectly patent, that the original plan for the immediate prosecution of the work of building the plant of the Northwestern Company had been deferred. Mr. Evans did not, in any of those conversations, make any claims that the Standard Portland Cement Corporation participated in any way in deferring of the building of the plant at Kendall. We all knew that Mr. Dingee was in control of the Standard Portland Cement Corporation.

[Testimony of Ernest E. Evans, for Plaintiffs and Respondents (Recalled).]

Thereupon ERNEST E. EVANS was recalled as a witness on behalf of the plaintiffs and respondents, and thereupon testified as follows, to wit: [678—228]

(Testimony of Ernest E. Evans.)

Cross-examination.

Mr. OLNEY.—Q. Mr. Evans, state whether or not at the first interview which you and Mr. Spencer and Mr. Smith had with Mr. Howard in March, 1908, any proposal or suggestion was made to you and the other gentlemen with you by Mr. Howard as to any plan for relieving you of your investment in the Northwestern Portland Cement Co.

Mr. DUNNE.—We object to that question upon the ground that it is leading and suggestive.

The MASTER.—I will overrule the objection.

Mr. DUNNE.—We note an exception.

A. Do you mean to say before Mr. Howard interviewed Mr. Dingee?

Mr. OLNEY.—Yes.

A. None whatever. I had no information at that interview as to what Mr. Dingee would not do. When Mr. Howard, as the result of that interview went on my behalf to see Mr. Dingee, he was to interview Mr. Dingee to see what they proposed doing in regard to going on with these works, or what he proposed doing with regard to the bonds. Mr. Howard had no authority on this errand to Mr. Dingee, either to make a proposal to Mr. Dingee or accept one from him on my behalf. I had no information or knowledge whatever at any time as to the intention of either the Standard Portland Cement Corporation or Mr. Dingee as to the disposition of the stocks and bonds of the Northwestern after they had been delivered

(Testimony of Ernest E. Evans.)

to the Standard Portland Cement Corporation, and I first learned of the actual disposition of the stocks and bonds of the Northwestern in court here. I had no intent in the transaction other than that set out in the certified copy of the resolution of the Board of Directors of the Standard Portland Cement Corporation which has been put in evidence in this case.

Cross-examination.

I could not give you from memory, Mr. Dunne, the date of that first interview; it was in March, 1908—in the latter part of March, [679—229] 1908, toward the end of March, and I think that the 25th or 26th of March, 1908, if not the correct date, would be a date very near it.

Mr. OLNEY.—That is the case for the plaintiffs and respondents.

Mr. DUNNE.—There is one matter here, Mr. Olney, with reference to the stock certificates that I would like to have an admission upon. It is in reference to a certain indorsement.

Mr. OLNEY.—It is stipulated that in the case of such certificates of stock of the Northwestern Portland Cement Company as are indorsed to the Standard Portland Cement Corporation, such indorsement was put upon the certificates in Mr. Howard's office; that is to say, the certificates were indorsed in blank, and then in Mr. Howard's office these words were written above the signature of the holder of the certificate, typewritten in blue ink: "for value received I hereby assign the within cer-

(Testimony of Ernest E. Evans.)

tificate to the Standard Portland Cement Corporation.”

Mr. BROBECK.—That is our case.

AND BE IT FURTHER REMEMBERED, that thereafter said cause was submitted to said Master as Referee for his report and findings; and that thereafter, on the 22d day of December, 1911, said Master and Referee made and returned to said Court his report, together with his findings of fact and conclusions of law, wherein said Master and Referee reports that said plaintiffs are entitled to judgment against each and all of said defendants, for the sum of Thirty-nine Thousand (\$39,000.00) Dollars, together with interest from the first day of May, 1908, at the rate of six (6) per cent per annum, compounded semi-annually, and for causes which said report and findings of fact and conclusions of law are now in the files of said court and cause; to which said report and said findings of fact and conclusions of law, and to the making, giving, rendering and filing thereof; and to each thereof, and the whole thereof, said defendants then and there duly excepted, and said defendants now assigns [680—230] the same as error.

That at the time that said Master made and returned to said Court his report as aforesaid in the above-entitled action, he likewise made and returned to the Court his report in the suit in equity between the parties hereto hereinbefore mentioned, wherein and whereby said Master found against said Stand-

ard Portland Cement Corporation upon all of the issues of fact presented by the pleadings in said suit, and reported as his conclusions of law that said Standard Portland Cement Corporation was not entitled to any relief against the plaintiffs in the above-entitled action by reason of said bill in equity, or any of the matters therein alleged, to which said report and said findings and conclusions of law in said suit in equity and to the making, giving, rendering and filing thereof, and to each thereof and the whole thereof, said Standard Portland Cement Corporation then and there duly excepted.

AND BE IT FURTHER REMEMBERED that thereafter exceptions were filed by said defendant, Standard Portland Cement Corporation, to said report of said Master and Referee, together with said findings and fact and conclusions of law, on the 5th day of January, A. D. 1912; and that thereafter, said exceptions came on duly to be heard by said Court on the 24th day of April, A. D. 1912, and were submitted to said Court for its ruling thereon, and said Court then and there made and gave its order overruling said exceptions and confirming said report, together with said findings of fact and conclusions of law, and directing judgment for said plaintiffs and against said defendants in accordance with said report; to which said ruling and order of said Court so given and made on said 24th day of April, A. D. 1912, and to the making, giving, rendering and filing thereof, and the whole thereof, said defendants then and there duly excepted and said defendants now assigns same as error. [681—231]

AND BE IT FURTHER REMEMBERED that thereafter, and on the 24th day of April, A. D. 1912, the judgment of said Court in said action was given, made and entered, wherein and whereby, it was and is adjudged by said Court that Ernest E. Evans, George Coleman, and Percy W. Evans, plaintiffs, do have and recover of and from the Standard Portland Cement Corporation, a corporation, William J. Dingee and Irving A. Bachman, defendants, the sum of Forty-nine Thousand Four Hundred and four and Three One-hundredths Dollars (\$49,404.03) together with the costs of plaintiffs in said action; to which said judgment, and to the making, giving, rendering, filing and entering thereof, and the whole thereof, said defendants then and there duly accepted, and now assigns the same as error.

AND BE IT FURTHER REMEMBERED, that at the same time that said defendant Standard Portland Cement Corporation filed exceptions to said report of the Master and Referee in the above-entitled action, together with his findings of fact and conclusions of law therein, said defendant likewise filed exceptions to the report of said Master and Referee, together with his findings of fact and conclusions of law in said suit in equity, and that said last-mentioned exceptions came on duly to be heard by the Court at the same time with the exceptions in the above-entitled cause, and were submitted to the Court for its ruling, and said Court at the time that it made its order overruling said exceptions in the above-entitled cause and confirming said report therein, together with said findings of fact and con-

clusions of law, and directing judgment for said plaintiffs and against said defendants in accordance with said report, likewise made its order overruling said exceptions in said suit in equity and confirming said report therein, together with the findings of fact and conclusions of law of the Referee therein, and directing judgment therein in favor of the [682—231a] plaintiffs in the above-entitled cause and against said Standard Portland Cement Corporation, that said Standard Portland Cement Corporation was not entitled to any relief against said plaintiffs by reason of said bill in equity or any of the matters therein alleged.

That thereafter, in accordance with said order, the judgment of said Court in said suit in equity was given, made and entered in favor of the plaintiffs in the above-entitled cause and against said defendant Standard Portland Cement Corporation, adjudging and decreeing that said Standard Portland Cement Corporation was not entitled to any relief against the plaintiffs in the above-entitled cause by reason of said bill in equity or any of the matters therein alleged.

And now come the above-named defendants and assign and specify the following errors occurring at the trial of said action, to wit: [683—231b]

[Assignment of Errors in Bill of Exceptions.]

I.

Particulars wherein the evidence is insufficient to justify the decision, and specification of errors under this head:

ASSIGNMENT OF ERRORS UNDER THE
AFORESAID GROUND NUMBER 1.

(a) Said evidence is wholly insufficient to justify that *that* of Finding II, of the findings of the Referee herein, on which Findings the decision herein is based, whereby it is found that on May 5, 1908, said Standard Portland Cement Corporation made, executed and delivered to the plaintiffs its promissory note dated May 1, 1908, for \$30,000.00; which said promissory note is set out at length in said Finding II; and in this behalf, this petitioner for a new trial shows that said evidence fails to disclose any right, power or authority in the Vice-President or Secretary, or both, of said Standard Portland Cement Corporation to make, execute or deliver to said plaintiffs the promissory note in said Finding II, set out; and in this behalf this petitioner for a new trial further shows that said evidence discloses that the attempted making, execution and delivery of the promissory note referred to in said Finding II, by said vice-president and secretary of said Standard Portland Cement Corporation, was a legal fraud upon and breach of trust against said Standard Portland Cement Corporation, committed by William J. Dingee, said vice-president, and participated in by said plaintiffs.

(b) Said evidence is wholly insufficient to justify that part of Finding II of the Findings of the Referee herein, on which Findings the decision herein is based, whereby it is found that said plaintiffs are and always have been the owners and holders of the promissory note in said Finding II set out, and

in this behalf, this petitioner for a new trial shows that there is no evidence herein to support said finding, [684—232] or any finding, that said promissory note ever had any lawful existence, or ever was a legal obligation of said Standard Portland Cement Corporation.

(c) Said evidence is wholly insufficient to justify that part of Finding III of the Findings of the Referee herein, on which Findings the decision herein is based, whereby it is found that on May 5, 1908, said Standard Portland Cement Corporation made, executed and delivered to Charles D. Rand its promissory note dated May 1, 1908, for \$5,000.00, which said promissory note is set out at length in said Finding III, and in this behalf, this petitioner for a new trial shows that said evidence fails to disclose any right, power or authority in the vice-president or secretary, or both, of said Standard Portland Cement Corporation to make, execute or deliver to said Charles D. Rand the promissory note in said Finding III set out; and in this behalf, this petitioner for a new trial further shows that said evidence discloses that the attempted making, execution and delivery of the promissory note referred to in said Finding III by said vice-president and secretary of said Standard Portland Cement Corporation, was a legal fraud upon and breach of trust against said Standard Portland Cement Corporation, committed by William J. Dingee, said vice-president, and participated in by said Charles D. Rand and said plaintiffs, his assignees.

(d) Said evidence is wholly insufficient to justify

that part of Finding III of the Findings of the Referee herein, on which findings the decision herein is based, whereby it is found that said plaintiffs, ever since the assignment and endorsement of said Charles D. Rand of said promissory note to them, have been the owners and holders thereof; [685—233] and in this behalf, this petitioner for a new trial shows that there is no evidence herein to support said finding, or any finding, that said promissory note ever had any lawful existence, or ever was a legal obligation of said Standard Portland Cement Corporation.

(e) Said evidence is wholly insufficient to justify that part of Finding IV of the Findings of the Referee herein, on which Findings the decision herein is based whereby it is found that on May 5, 1908, said Standard Portland Cement Corporation made, executed and delivered to T. R. Stockett, Trustee, its promissory note dated May 1, 1908, for \$3,000.00, which said promissory note is set out at length in said Finding IV; and in this behalf, this petitioner for a new trial shows that said evidence fails to disclose any right, power or authority in the vice-president or secretary, or both, of said Standard Portland Cement Corporation to make, execute or deliver to said T. R. Stockett, Trustee, the promissory note in said Finding IV set out; and in this behalf, this petitioner for a new trial further shows that said evidence discloses that the attempted making, execution and delivery of the promissory note referred to in said Finding IV, by said vice-president and secretary of said Standard Portland Cement Corporation, was a legal fraud upon and breach of trust against said

Standard Portland Cement Corporation, committed by William J. Dingee, said vice-president, and participated in by said T. R. Stockett, Trustee, and said plaintiffs, his assignees.

(f) Said evidence is wholly insufficient to justify that part of Finding IV of the Findings of the Referee herein, on which Findings the decision herein is based, whereby it is found that said plaintiffs, ever since the [686—234] assignment and endorsement by said T. R. Stockett, Trustee, of said promissory note to them, have been the owners and holders thereof; and in this behalf this petitioner for a new trial shows that there is no evidence herein to support said finding, or any finding, that said promissory note ever had any lawful existence, or ever was a legal obligation of said Standard Portland Cement Corporation.

(g) The said evidence is wholly insufficient to justify that part of Finding V of the Findings of the Referee herein, on which Findings the decision herein is based, whereby it is found that on May 5, 1908, said Standard Portland Cement Corporation made, executed and delivered to Thomas Graham its promissory note dated May 1, 1908, for \$1,000.00, which said promissory note is set out at length in said Finding V; and in this behalf this petitioner for a new trial shows that said evidence fails to disclose any right, power or authority, in the vice-president or secretary, or both, of said Standard Portland Cement Corporation, to make, execute or deliver to said Thomas Graham the promissory note in said Finding V set out; and in this behalf, this petitioner for a new trial further shows that said evidence discloses

that the attempted making, execution and delivery of the promissory note referred to in said Finding V by said vice-president and secretary of said Standard Portland Cement Corporation, committed by William J. Dingee, said vice-president, and participated in by said Thomas Graham and said plaintiffs, his assignees.

(h) Said evidence is wholly insufficient to justify that part of Finding V of the Findings of the Referee herein, on which findings the decision herein is based, whereby it is found that said plaintiffs, ever since the assignment and endorsement by said Thomas Graham of said [687—235] promissory note to them, have been the owners and holders thereof; and in this behalf this petitioner for a new trial shows that there is no evidence herein to support that finding, or any finding, that said promissory note ever had any lawful existence, or ever was a legal obligation of said Standard Portland Cement Corporation.

(i) Said evidence is wholly insufficient to justify Finding VI of the Findings of the Referee herein, on which findings the decision herein is based, whereby it is found that each of the promissory notes in said Findings mentioned was made, executed and delivered for a valuable consideration paid and delivered by the respective payees of said notes to said Standard Portland Cement Corporation on May 5, 1908, that is to say, on said date, the above-named plaintiffs delivered to said Standard Portland Cement Corporation 30 bonds and 300 shares of the stock of the Northwestern Portland Cement Company, a corporation, and in consideration therefor there was

delivered to the plaintiffs the promissory note set forth in the above-mentioned Finding numbered II, and at the same time Charles D. Rand delivered to said Standard Portland Cement Corporation 5 bonds and 50 shares of the stock of the Northwestern Portland Cement Company, a corporation, and in consideration therefor there was delivered to said Rand the promissory note set forth in the above-mentioned Finding numbered III, and that at the same time T. R. Stockett, Trustee, delivered to said Standard Portland Cement Corporation 3 bonds and 30 shares of the stock of the Northwestern Portland Cement Company, a corporation, and in consideration therefor there was delivered to said T. R. Stockett, Trustee, the promissory note set forth in the above-mentioned Finding numbered IV, and that at the same time Thomas Graham delivered to [688—236] said Standard Portland Cement Corporation 1 bond and 10 shares of the stock of the Northwestern Portland Cement Company, a corporation, and in consideration therefor there was delivered to said Thomas Graham the promissory note set forth in the above-mentioned Finding numbered V; and in this behalf this petitioner for a new trial shows that said evidence fails to show that any of said bonds or shares of said stock of said Northwestern Portland Cement Company, said corporation, hereinabove and in said Finding numbered VI referred to, were ever delivered to said Standard Portland Cement Corporation, or came into its possession or under its control, or passed into its treasury; and in this behalf, this petitioner for a new trial further shows that said evi-

dence discloses that said bonds and said shares of stock were delivered to and received by and passed into the treasury of said Northwestern Portland Cement Company; and in this behalf this petitioner for a new trial further shows that said evidence fails to show that any of the above-mentioned promissory notes were made, executed or delivered for a valuable or any consideration, paid and delivered, or paid or delivered, by the respective or any payees, or payee, of said notes, or of any of them to said Standard Portland Cement Corporation on May 5, 1908, or at any other time, or at all.

(j) Said evidence is wholly insufficient to justify the Findings of the Referee herein, on which findings the decision herein is based, and more particularly Finding numbered VII, wherein and whereby said Referee hath omitted to find upon every issue presented by the answer of said Standard Portland Cement Corporation in the above-entitled action, and hath found that the same issues were presented in the equity suit numbered 15,249 in said Finding VII referred to, and that said issues were in said equity cause determined adversely [689—237] to said Standard Portland Cement Corporation, and in this behalf this petitioner for a new trial herein shows that there was evidence before said Referee upon which the other issues referred to in said Finding VII should have been determined in the above-entitled action, whether involved in the aforesaid equity suit or not, that the adverse determination of said other issues in said equity suit was not warranted, justified or sustained by the evidence in said equity suit, but

was contrary to the evidence, and to the weight and effect of the evidence therein, and that said Referee should have found said issues in said equity suit numbered 15,249, favorably to said Standard Portland Cement Corporation.

(k) Said evidence is wholly insufficient to justify the Findings of the Referee herein, on which findings the decision herein is based, and more particularly the Finding of said Referee that said plaintiffs are entitled to judgment against said defendants, and each of them, for the sum of \$39,000.00, together with interest at the rate of six per cent (6%) per annum, from the first day of May, 1908, compounded semi-annually, and for costs; and in this behalf, this petitioner for a new trial herein shows that said evidence discloses a valid defense on the part of said Standard Portland Cement Corporation in the above-entitled action, and that upon the pleadings, evidence and record in said action said Standard Portland Cement Corporation was entitled to findings and judgment in its favor and against said plaintiffs.

II.

Particulars wherein said decision is contrary to and against law, an assignment of errors under this heading.

ASSIGNMENT OF ERRORS UNDER THE AFORESAID GROUND NUMBER 2. [690] —238]

(a) Said decision is contrary and against law because of errors of law occurring during the trial and excepted to by said Standard Portland Cement

Corporation; and in this behalf, this petitioner for a new trial hereby makes express reference to the detailed specifications herein included in the Assignment of Errors under the aforesaid ground number 3, and makes them and each of them part and parcel of this specification.

(b) Said decision is contrary to and against law, because of the insufficiency of the evidence to justify said decision; and said petitioner for a new trial hereby makes express reference to the detailed specifications herein included in the Assignment of Errors under the aforesaid ground number 1, and makes them and each of them part and parcel of this specification.

(c) Said decision is contrary to and against law, because said Findings failed to find, but should have found, that the financial crisis for the year 1907 began in the spring of that year, and that during the year 1907 and 1908 William J. Dingee was without funds wherewith to carry on any enterprise, and was insolvent, and that said plaintiffs and their assignors received the par value of the bonds improperly found to have been purchased by said Standard Portland Cement Corporation, together with accrued interest thereon, up to the date of the promissory notes in the above-mentioned Findings referred to.

(d) Said decision is contrary to and against law, because in and by said Findings it is found that said Standard Portland Cement Corporation has no valid defense against or in the above-entitled action, and is not entitled to any relief against the above-named plaintiffs, and that the above-named plaintiffs are en-

titled to judgment against said defendants [691—239] in the manner and form stated in said Referee's Conclusions of Law in the above-entitled action; whereas said Referee hath failed to find, but should have found, that said defendants, and in particular said Standard Portland Cement Corporation, have a valid defense in and to the above-entitled action, and are entitled to the relief prayed for in the answers therein, and that the above-named plaintiffs should take nothing by their action herein, and that said defendants and each of them should have judgment herein for costs.

(e) Said decision is contrary to and against law, because it failed to grant the relief prayed for by said Standard Portland Cement Corporation, and was given, made and rendered in favor of the above-named plaintiffs and against the above-named defendants, and because said decision was and is contrary to the evidence and to the weight and effect of the evidence, and to the case made and stated in the pleadings, evidence and record in the above-entitled action.

(f) Said decision is contrary to and against law, because upon the evidence received upon the hearing of said cause said Master and Referee erred in making his report and findings of fact and conclusions of law in favor of said plaintiff and against said defendants, and should have made his report and findings of fact and conclusions of law in favor of said defendants and against said plaintiffs.

(g) Said decision is contrary to and against law, because said Court erred in making and giving its

order overruling the exceptions of said defendants, the Standard Portland Cement Corporation, to said report and findings of fact and conclusions of law of said Master and Referee; and erred in confirming said report and findings of fact and conclusions of law; and erred in directing judgment for said plaintiffs [692—240] and against said defendants in accordance with said report; and said Court erred in failing to sustain said objection of said defendant, Standard Portland Cement Corporation to said report, together with said findings of fact and conclusions of law, and erred in failing to direct judgment in favor of said defendants and against said plaintiffs.

(h) Said decision was contrary to and against law, because said Court erred in making, giving, rendering and entering judgment herein, in favor of said plaintiffs and against said defendants; and erred in failing to give, make, render and enter therein its judgment in favor of said defendants and against said plaintiffs.

III.

ERRORS IN LAW OCCURRING AT THE TRIAL.

ASSIGNMENT OF ERRORS UNDER THE AFORESAID GROUND NO. III.

(a) Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness Ernest E. Evans on cross-examination in his deposition now on file in the above-entitled action,—

“Mr. Evans, at the time of the sale of the bonds and stocks of the Northwestern Portland Cement Co. to the Standard Portland Cement Corporation, had you considered in your own mind the value of the assets of the Northwestern Portland Cement Company?”

Said objection was made upon the ground that said question and the evidence sought to be elicited thereby were incompetent, immaterial and irrelevant, and not pertinent to any issue in the case and assuming a fact as to which there was no evidence, to wit, that there was any sale to the Standard Portland Cement Corporation, and calling for the secret, uncommunicated mental processes of the witness. Said objection [693—241] was overruled by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

(b) Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation to strike out all of the testimony given by the witness Ernest E. Evans in his deposition now on file in the above-entitled action, relative to the values, and particularly to the value of any estate or assets of the Northwestern Portland Cement Company. Said motion was made upon the ground that said testimony of said witness was incompetent, immaterial and irrelevant, without foundation,—it not appearing that the witness knew either the intrinsic value of the alleged assets or the market value thereof, and upon the ground that the answer as given was not responsive to the question asked. Said

motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

(c) Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness Ernest E. Evans on cross-examination in his deposition now on file in the above-entitled action:

“What figure, if any, did you put upon those assets?”

Said objection was made upon the ground that said question and the evidence sought to be elicited thereby were incompetent, immaterial and irrelevant, and not pertinent to any issue in the case and assuming a fact as to which there was no evidence, to wit, that there was any sale to the Standard Portland Cement Corporation, and calling for the secret, uncommunicated mental processes of the witness, and upon the further ground that his mental condition, or mental processes, beliefs, or private opinions, uncommunicated, are immaterial to any issue in this case, and to not constitute any fact or facts by which said Standard Portland [694—242] Cement Corporation could or should be bound. Said objection was overruled by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

(d) Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation to strike out the following answer given by the witness Ernest E. Evans, on his cross-exam-

ination in his deposition now on file in the above-entitled action:

“Well, I considered that they were worth between \$240,000 and \$250,000, that is, if the company were liquidated.”

Said motion was made upon all the grounds stated in the objection mentioned in the last preceding paragraph herein, and upon the further ground that said answer was purely speculative. Said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

(e) Said Referee erred in receiving and in denying the motion of said Standard Portland Cement Corporation to strike out the following answer given by the witness Ernest E. Evans, on cross-examination in his deposition now on file in the above-entitled action, in response to the question

“By ‘liquidated’ you mean, namely, that is to say, if the company went into liquidation, and the assets were sold, they would realize between \$240,000 and \$250,000, but as a going concern I considered that it was worth par easily, because the money which was actually spent in construction would have had to be spent, anyhow.”

Said motion was made upon all the grounds enumerated in paragraph (c) hereof, and upon the further ground that said answer is not responsive to the question asked, and upon the [695—243] further ground that the witness was merely speculating as to possibilities, and not stating a fact, but making

an argument. Said motion was denied by said Referee, to which ruling the said Standard Portland Cement Corporation duly excepted and now assigns the same as error.

(f) Said Referee erred in receiving and in denying the motion of said Standard Portland Cement Corporation to strike out the following passage from the testimony given by the witness, Ernest E. Evans, on cross-examination in his deposition now on file in the above-entitled action,—

“Q. Considering the concern as a going concern, or as a concern the owners of which contemplate going ahead with it, would you have *out a different figures* upon the assets? A. Certainly, the going ahead with it. I would consider it fully worth par.”

Said motion was made upon all the grounds heretofore stated in paragraph (c) hereof and in the last preceding paragraph hereof. Said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation duly excepted and now assigns the same as error.

(g) Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation, to strike out, the following passage from the testimony given by the witness Ernest E. Evans on cross-examination in his deposition now on file in the above-entitled action,—

“Q. At the time referred to of the sale of your stocks and bonds to the Standard Portland Cement Corporation, did you have any information as to the plans of Mr. Dingee or Mr. Bach-

man for going ahead, or not going ahead with the Northwestern Cement Company? A. Yes; I distinctly understood all along that they were going ahead with this, only they had stopped it owing to the financial panic until things [696—244] settled down again, and at the time that I met Dr. Bachman when he went to examine the property, of course we spent the evening together, and he distinctly stated this Northwestern Portland Cement Company was to be eventually amalgamated with the Santa Cruz and the Standard Portland Cement Corporation.”

Said motion was made upon all the grounds heretofore enumerated in the previous paragraphs herein, and upon the further grounds that the above mentioned answer was incompetent, immaterial, and irrelevant, not responsive, involving hearsay, *ex parte* declarations of persons by whose statements the above-named Standard Portland Cement Corporation would not be bound or should not be bound, and not proper cross-examination. Said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

(h) Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation to strike out, the following passage from the testimony given by the witness Ernest E. Evans on cross-examination in his deposition now on file in the above-entitled action,—

“What interest, if any, did you understand

the Standard Portland Cement Company had in the Northwestern Cement Company?

A. Well, the idea of starting the Northwestern Company was strategic, and with the idea of protecting the other factories.”

Said motion was made upon all the grounds heretofore stated in the last preceding paragraph hereof. Said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error. [697—245]

(i) Said Referee erred in receiving, and denying the motion of said Standard Portland Cement Corporation to strike out, a portion of the following passage from the testimony given by the witness John L. Howard on cross-examination upon the hearing in the above-entitled action,—

“Q. At the time of the purchase of the bonds of the Northwestern Portland Cement Company by the Standard Portland Cement Corporation was anything said by Mr. Dingee as to the plans of the Standard Portland Cement Corporation relative to the Northwestern? A. I don’t recall that he said anything at that time, but both he and Bachman had frequently spoken of it before.”

Said motion was made upon the ground that the latter half of the foregoing answer was not responsive to the question asked. Said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

(j) Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness John L. Howard on cross-examination upon the hearing of the above-entitled action,—

“Q. I call your attention to Defendants’ Exhibit 2, and to the letter therein by the Standard Portland Cement Corporation to the Western Fuel Company dated March 8, 1906, and to the assignment therein dated June 30, 1906, by the Western Fuel Company to the Western Building Material Company of the sales contract between the Western Fuel Company and the Standard Portland Cement Company, and to the consent therein of such assignment by the Standard Portland Cement Company, and ask you what is the explanation [698—246] of the provision in the letter and assignment to the effect that the sales contract may at any time be terminated at the option of the Standard Portland Cement Company in case you yourself should cease at any time to be the general executive office of the Western Fuel Company or the Western Building Material Company?”

Said objection was made upon the ground that said question and the testimony sought to be elicited thereby were immaterial, irrelevant and incompetent, not proper cross-examination, without foundation in this, that it does not appear that the witness knows, and an attempt to vary the terms of a written instrument of parol evidence. Said objection was overruled by said Referee, to which ruling said

Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

(k) Said Referee erred in sustaining the objection of the above-named plaintiffs to the following question asked the witness John L. Howard upon the hearing of the above-entitled matter,—

“Q. Now, it appeared then at that time that you were in doubt whether you learned of that at the time of the Wenzelburger report or whether you learned of it later?”

Said objection was made upon the ground that said question assumes something that is not in the case. Said objection was sustained by said Referee, to which ruling said Standard Cement Corporation then and there duly excepted and now assigns the same as error.

(l) Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness Foster Young upon the hearing [699—247] in the above-entitled action,—

“Q. But you understood, anyhow, did you not, that he came there in accordance with the letter of May 4, 1908?”

Said objection was made upon the ground that said question and the testimony sought to be elicited thereby were incompetent and not proper cross-examination, and upon the further ground that the understanding of the witness is not evidence. Said objection was overruled by said Referee, to which ruling said Standard Portland Cement Corporation

then and there duly excepted and now assigns the same as error.

(m) Said Referee erred in granting the motion of the above-named plaintiffs to strike out from the record in the above-entitled action the minute-book of the Northwestern Portland Cement Corporation, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

(n) Said Referee erred in sustaining the objection of the above-named plaintiffs to the introduction in evidence upon the hearing of the above-entitled action of the book containing the bond account and record of subscriptions and sales of bonds of the Northwestern Portland Cement Company. Said objection was made upon the ground that said book was incompetent, immaterial, hearsay, and not the best evidence. Said objection was sustained by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

(o) Said Referee erred in sustaining the objection of the above-named plaintiffs to the receiving in evidence upon the hearing of the above-entitled action of the memorandum slip in the handwriting of William J. Dingee showing subscription for bonds of the Northwestern Portland Cement Company. Said objection was made upon the ground that said [700—248] memorandum slip was incompetent, hearsay and not binding upon any of the parties to this action, and not within the knowledge of the witness. Said objection was sustained by said Referee,

to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

(p) Said Referee erred in sustaining the objection of the above-named plaintiffs to the following question asked the witness Foster Young during the hearing of the above-entitled action,—

“Q. Has there ever been any question in your mind as to whether you held those bonds to the order of the Standard Portland Cement Corporation?”

Said objection was made upon the ground that said question was incompetent and immaterial and calling for the opinion and view of the witness. Said objection was sustained by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

(q) Said Referee erred in sustaining the objection of the above-named plaintiffs to the following question asked the witness Foster Young during the hearing of the above-entitled action,—

“Q. Have you ever regarded the Standard Portland Cement Corporation as in any manner the owner of those bonds?”

Said objection was made upon the ground that said question was incompetent and immaterial and calling for the opinion and view of the witness. Said objection was sustained by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error. [701—249]

(r) Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness John L. Howard upon the hearing of the above-entitled action,—

“Mr. Howard will you state to the Court what evidences of lime there were in this ground in Washington which was finally acquired by the Northwestern Portland Cement Company?”

Said objection was made upon the ground that said question and the testimony sought to be elicited thereby were immaterial, irrelevant and incompetent, and without foundation in this that it was not shown that the witness is competent, and upon the further ground that it was not a proper subject matter in any event for statement by the witness—he not having been shown to have been experienced in the line to which the inquiry was addressed, and upon the further ground that the witness was a general merchant and neither a geologist nor an expert upon these matters, and upon the further ground that it already appeared that the witness had not been actually on the spot. Said objection was overruled by said Referee, to which ruling the said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

(s) Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness John L. Howard at the hearing in the above-entitled action,—

“Q. What was its extent?”

Said objection was made upon the ground that no foundation had been laid, in this, that it did not appear that the witness knew. Said objection was overruled by said Referee, to which ruling the said Standard Portland Cement Corporation [702—250] then and there duly excepted, and now assigns the same as error; and in this behalf this defendant, Standard Portland Cement Corporation, further assigns as error the ruling of said Referee admitting general statements by said witness John L. Howard as to the extent and size of the above-mentioned lime deposits.

(t) Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness John L. Howard during the hearing of the above-entitled action,—

“Q. Did this acceptance or any other acceptance by the Western Fuel Company in favor of either the Standard Cement Corporation or the Santa Cruz Portland Cement Company have anything to do or play any part in connection with the sale of the bonds of the Northwestern Portland Cement Company involved in this transaction?”

Said objection was made upon the ground that said question and the testimony sought to be elicited thereby were immaterial, irrelevant, and incompetent, and calling for the opinion and private judgment of the witness, and upon the further ground that the witness had already testified that he had no recollection as to anything else affecting these ac-

ceptances except what appeared on the paper itself. Said objection was overruled by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

(u) Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness John L. Howard during the hearing of the above-entitled action,—

“Q. What knowledge or information did you have as to [703—251] any intention on the part of Mr. Dingee that the bonds and stock of the Northwestern Portland Cement Company purchased by the Standard Portland Cement Corporation were not to be held by the latter company, but were to be turned over to the Northwestern Company?”

Said objection was made upon the ground that the question asked and the testimony sought to be elicited thereby were incompetent, being an effort to establish the intention of one person by the statements of another person. Said objection was overruled by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

(v) Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation to strike out, the following passage from the testimony given by the witness John L. Howard during the hearing of the above-entitled action,—

“Q. What knowledge or information did you

have as to the actual disposition of the bonds and stocks of the Northwestern that was sold to the Standard Portland Cement Corporation?

A. The only knowledge that I had was the fact of their delivery by Mr. Norcross to Mr. Young, Beyond that nothing."

Said motion to strike out was made upon the ground that the question asked and answer calls for and states the conclusion of the witness, on the further ground that it does not appear that the witness had any real or personal knowledge upon the subject, and upon the further ground that he testified from hearsay only. Said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

(w) Said Referee erred in overruling the objection [704—252] of said Standard Portland Cement Corporation to the following question asked the witness Sidney V. Smith upon his direct examination during the hearing of the above-entitled action,—

"Q. What took place at that interview as you remember it?"

Said objection was made upon the ground that the question and the testimony sought to be elicited thereby were immaterial, irrelevant and incompetent, and calling for hearsay, and upon the further ground that it did not appear that the party or parties sought to be charged with what took place at that interview, or any representative of them was present thereat, and upon the further ground that as

against the Northwestern Portland Cement Company, and particularly as against the Standard Portland Cement Corporation the proffered evidence was *res inter alios acta*, and self-serving. Said objection was overruled by said Referee, to which ruling the said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

(x) Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness Ernest E. Evans during the hearing of the above-entitled action,—

“Q. Mr. Evans, state whether or not at the first interview which you and Mr. Spencer and Mr. Smith had with Mr. Howard in March, 1908, any proposal or suggestion was made to you and the other gentlemen with you, by Mr. Howard, as to any plan for relieving you of your investments in the Northwestern Portland Cement Company?”

Said objection was made upon the ground that said question was leading and suggestive. Said objection was overruled by said Referee, to which ruling said Standard Portland [705—253] Cement Corporation then and there duly excepted and now assigns the same as error.

(y) Said Referee erred in finding that said Standard Portland Cement Corporation has no valid defense against or in the above-entitled action, and is not entitled to any relief against the above-named plaintiffs, and that the above-named plaintiffs are en-

titled to a judgment against said defendants in the manner and form stated in said Referee's Conclusions of Law in the above-entitled action. To which said findings by said Referee said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

(z) Said Referee erred in failing to find, but should have found, that said Standard Portland Cement Corporation has a valid defense in and to the above-entitled action, and is entitled to the relief prayed for in its answer therein; and failed to find, but should have found, that the above-named plaintiffs should take nothing by their action herein, and that said Standard Portland Cement Corporation should have judgment herein for its costs. Which said action by said Referee this petitioner for a new trial now assigns as error.

(aa) Said Referee erred in not granting the relief prayed for by this petitioner, and in giving, making and rendering his report and findings in favor of the above-named plaintiffs and against this petitioner for a new trial; and erred in not giving, making and rendering his report and findings in the above-entitled cause in favor of this petitioner, and against the above-named plaintiffs; and erred in giving, making and rendering his report and findings in the above-entitled cause in favor of said plaintiffs and against said defendants upon the [706—254] pleadings, evidence and record in the above-entitled action; all of which said action by said Referee this petitioner for a new trial now assigns as error.

(bb) Said Referee erred in giving, making and rendering his report and findings in the above-en-

titled cause in favor of said plaintiffs and against said defendants, in this, that said report and findings, and each and all of them, were and was and are and is contrary to law, not warranted, justified or sustained by the evidence, and contrary to the evidence and to the weight and effect of the evidence and to the case made and stated in the pleadings, evidence and record in the above-entitled cause; all of which this petitioner for a new trial now assigns as error.

(cc) Said Circuit Court erred in overruling the objections and exceptions of said Standard Portland Cement Corporation to said report and findings of said Referee, in confirming said report and findings of said Referee, and in ordering judgment in the above-entitled action in conformity with said report and findings; to all of which said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

(dd) Said Circuit Court erred in giving, making, rendering and entering its judgment in the above-entitled action in favor of said plaintiffs and against said defendants, in conformity with said report and findings of said Referee; to all of which said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

AND BE IT FURTHER REMEMBERED hereby that said Standard Portland Cement Corporation relies upon any error apparent from the pleadings, testimony, exhibits and documents on file

in said [707—255] Court and Cause not herein-above covered.

AND BE IT FURTHER REMEMBERED that the above and foregoing bill of exceptions is a full, true and accurate statement of all the evidence in the cause, and also and in addition thereto, a full, true and accurate statement of all objections, rulings and exceptions relied on by said Standard Portland Cement Corporation, and other proceedings in and upon the above-entitled cause and said trial, and that no other or different evidence, objections, rulings or exceptions relied on by said Standard Portland Cement Corporation were had in or upon the above-entitled cause or said trial.

And now, within due time, said Standard Portland Cement Corporation presents and tenders this, its said bill of exceptions to said Court, and in order that said exceptions may be preserved and perpetuated, and in furtherance of justice and that right may be done, said Standard Portland Cement Corporation presents the foregoing as its bill of exceptions herein, and prays that the same may be settled, approved, allowed, signed and certified as provided by law.

THE STANDARD PORTLAND CEMENT
CORPORATION, A Corporation, De-
fendant.

By MORRISON, DUNNE & BROBECK
and J. J. DUNNE,

Its Attorneys. [708—256]

[Order Settling and Allowing Bill of Exceptions.]

The foregoing Bill of Exceptions is correct, and may be settled, allowed and approved without notice.

Dated: San Francisco, November 15th, 1912.

J. E. PRINGLE,
OLNEY, PRINGLE & MANNON,
PAGE, McCUTCHEN, KNIGHT &
OLNEY,

Attorneys for Ernest E. Evans, George Coleman and
Percy W. Evans, Partners Doing Business Under
the Firm Name of Evans, Coleman & Evans,
Said Plaintiffs.

The above and foregoing bill of exceptions is hereby settled and allowed in all respects as stipulated by the parties thereto.

November 31st, 1912.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed Nov. 21, 1912. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [709]

*In the District Court of the United States in and for
the Northern District of California, Second Di-
vision.*

No. 14,887.

ERNEST E. EVANS, GEORGE COLEMAN and
PERCY W. EVANS, Partners Doing Busi-
ness Under the Firm Name of EVANS,
COLEMAN and EVANS,
Plaintiffs,

vs.

STANDARD PORTLAND CEMENT CORPORA-
TION, a Corporation, WILLIAM J. DIN-
GEE and IRVING A. BACHMAN,
Defendants.

Petition for Writ of Error.

The above-named Standard Portland Cement Corporation conceiving itself aggrieved by the final judgment given, made and entered by the above-named court in the above-entitled cause, upon the issues therein joined, under date of April 24th, A. D. 1912, said judgment being now on file in said cause and Court, it hereby petitions the above-entitled court for an order allowing it to prosecute a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, from said judgment, and from the whole thereof, for the reasons set forth in the Assignments of Errors which is filed herewith, under and pursuant to the laws of the United States in that behalf made and provided and it prays that this petition for said Writ of Error may be allowed, and that

a transcript of the record, proceedings and papers upon which said judgment was given, made and entered, as aforesaid, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California.

Dated: San Francisco, July 25, 1912.

J. J. DUNNE,

MORRISON, COPE & BROBECK,

MORRISON, DUNNE & BROBECK,

Attorneys for said Plaintiff in Error, Standard
Portland Cement Corporation.

[Endorsed]: Filed Jul. 25, 1912. Jas. P. Brown,
Clerk. By J. A. Schaertzer, Deputy Clerk. [710]

*In the District Court of the United States in and for
the Northern District of California, Second Di-
vision.*

No. 14,887.

ERNEST E. EVANS, GEORGE COLEMAN and
PERCY W. EVANS, Partners Doing Busi-
ness Under the Firm Name of EVANS,
COLEMAN and EVANS,

Plaintiffs,

vs.

STANDARD PORTLAND CEMENT CORPORA-
TION, a Corporation, WILLIAM J. DIN-
GEE and IRVING A. BACHMAN,

Defendants.

Assignment of Errors [on Writ of Error].

Now comes the Standard Portland Cement Corpo-
ration, a corporation, defendant above named, and

makes and files the following Assignment of Errors upon which it will rely in the prosecution of its Writ of Error in the above-entitled cause:

1.

The evidence received upon the trial of the above-entitled action is wholly insufficient to justify that of Finding II of the findings of the Referee herein on which findings the decision herein is based, whereby it is found that on May 5, 1908, said Standard Portland Cement Corporation made, executed and delivered to the plaintiffs its promissory note dated May 1, 1908, for \$30,000.00, which said promissory note is set out at length in said Finding II; and in this behalf, this petitioner for a new trial shows that said evidence fails to disclose any right, power or authority in the vice-president or secretary, or both, of said Standard Portland Cement Corporation to make, execute or deliver to said plaintiffs the promissory note in said Finding II set out; and in this behalf, this petitioner for a new trial further shows that said evidence discloses that the attempted making, execution [711] and delivery of the promissory note referred to in said Finding II, by said vice-president and secretary of said Standard Portland Cement Corporation, was a legal fraud upon, and breach of trust against said Standard Portland Cement Corporation, committed by William J. Dingee, said vice-president, and participated in by said plaintiffs.

2.

Said evidence is wholly insufficient to justify that part of Finding II of the Findings of the Referee

herein, on which Findings the decision herein is based, whereby it is found that said plaintiffs are and always have been the owners and holders of the promissory note in said Finding II set out; and in this behalf, this petitioner for a new trial shows that there is no evidence herein to support said finding, or any finding, that said promissory note ever had any lawful existence, or ever was a legal obligation of said Standard Portland Cement Corporation.

3.

Said evidence is wholly insufficient to justify that part of Finding III of the Findings of the Referee herein, on which Findings the decision herein is based, whereby it is found that on May 5, 1908, said Standard Portland Cement Corporation made, executed and delivered to Charles D. Rand its promissory note dated May 1, 1908, for \$5,000.00, which said promissory note is set out at length in said Finding III, and in this behalf, this petitioner for a new trial shows that said evidence fails to disclose any right, power or authority in the vice-presidency or secretary, or both, of said Standard Portland Cement Corporation to make, execute or deliver to said Charles D. Rand the promissory note in said Finding III, set [712] out; and in this behalf, this petitioner for a new trial further shows that said evidence discloses that the attempted making, execution and delivery of the promissory note referred to in Finding III, by said vice-president and secretary of said Standard Portland Cement Corporation, was a legal fraud upon, and breach of trust against said Standard Portland Cement Corporation, committed

by William J. Dingee, said vice-president, and participated in by said Charles D. Rand, and said plaintiffs, his assignees.

4.

Said evidence is wholly insufficient to justify that part of Finding III, of the Findings of the Referee herein, on which findings the decision herein is based, whereby it is found that said plaintiffs, ever since the assignment and endorsement by said Charles D. Rand of said promissory note to them, have been the owners and holders thereof; and in this behalf, this petitioner for a new trial shows that there is no evidence herein to support said finding, or any finding, that said promissory note ever had any lawful existence, or ever was a legal obligation of said Standard Portland Cement Corporation.

5.

Said evidence is wholly insufficient to justify that part of Finding IV of the Findings of the Referee herein, on which Findings the decision herein is based, whereby it is found that on May 5, 1908, said Standard Portland Cement Corporation made, executed and delivered to T. R. Stockett, Trustee, its promissory note dated May 1, 1908, for \$3,000.00, which said promissory note is set out at length in said Finding IV; and in this behalf, this petitioner for a new trial shows that said evidence fails to disclose any right, power or authority [713] in the vice-president or secretary, or both, of said Standard Portland Cement Corporation to make, execute or deliver to said T. R. Stockett, Trustee, the promissory note in said Finding IV, set out; and in this

behalf, this petitioner for a new trial further shows that said evidence discloses that the attempted making, execution and delivery of the promissory note, referred to in said Finding IV, by said vice-president and secretary of said Standard Portland Cement Corporation, was a legal fraud upon, and breach of trust against said Standard Portland Cement Corporation, committed by William J. Dingee, said vice-president, and participated in by said T. R. Stockett, trustee, and said plaintiffs, his assignees.

6.

Said evidence is wholly insufficient to justify that part of Finding IV of the Findings of the Referee herein, on which Findings the decision herein is based, whereby it is found that said plaintiffs, ever since the assignment and endorsement by said T. R. Stockett, trustee, of said promissory note to them, have been the owners and holders thereof; and in this behalf, this petitioner for a new trial shows that there is no evidence herein to support said finding, or any finding, that said promissory note ever had any lawful existence, or ever was a legal obligation of said Standard Portland Cement Corporation.

7.

Said evidence is wholly insufficient to justify that part of Finding V of the Findings of the Referee herein, on which Findings the decision herein is based, whereby it is found that on May 5, 1908, said Standard Portland Cement Corporation made, executed and delivered to Thomas Graham its promissory [714] note dated May 1, 1908 for \$1,000.00, which said promissory note is set out at length in

said Finding V; and in this behalf, this petitioner for a new trial shows that said evidence fails to disclose any right, power or authority, in the vice-president or secretary, or both, of said Standard Portland Cement Corporation, to make, execute or deliver to said Thomas Graham the promissory note in said Finding V set out; and in this behalf, this petitioner for a new trial further shows that said evidence discloses that the attempted making, execution and delivery of the promissory note referred to in said Finding V, by said vice-president and secretary of said Standard Portland Cement Corporation, committed by William J. Dingee, said vice-president, and participated in by said Thomas Graham and said plaintiffs, his assignees.

8.

Said evidence is wholly insufficient to justify that part of Finding V of the Findings of the Referee herein, on which Findings the decision herein is based, whereby it is found that said plaintiffs, ever since the assignment and endorsement by said Thomas Graham of said promissory note to them, have been the owners and holders thereof; and in this behalf, this petitioner for a new trial shows that there is no evidence herein to support that finding, or any finding, that said promissory note ever had any lawful existence, or ever was a legal obligation of said Standard Portland Cement Corporation.

9.

Said evidence is wholly insufficient to justify Finding VI of the Findings of the Referee herein, on which findings the decision herein is based, where-

by it is found that each of the promissory notes in said Findings mentioned was made, [715] executed and delivered for a valuable consideration paid and delivered by the respective payees of said notes to the Standard Portland Cement Corporation on May 5, 1908, that is to say: on said date, the above-named plaintiffs delivered to said Standard Portland Cement Corporation 30 bonds and 300 shares of the stock of the Northwestern Portland Cement Company, a corporation, and in consideration therefor there was delivered to the plaintiffs the promissory note set forth in the above-mentioned Finding numbered II, and that at the same time, Charles D. Rand delivered to said Standard Portland Cement Corporation 5 bonds and 50 shares of the stock of the Northwestern Portland Cement Company, a corporation, and in consideration therefor there was delivered to said Rand the promissory note set forth in the above-mentioned Finding numbered III, and that at the same time, T. R. Stockett, trustee, delivered to said Standard Portland Cement Corporation 3 bonds and 30 shares of the stock of the Northwestern Portland Cement Company, a corporation, and in consideration therefor there was delivered to said T. R. Stockett, trustee, the promissory note set forth in the above-mentioned Finding numbered IV, and that at the same time Thomas Graham delivered to said Standard Portland Cement Corporation 1 bond and 10 shares of the stock of the Northwestern Portland Cement Company, a corporation, and in consideration therefor there was delivered to said Thomas Graham the

promissory note set forth in the above-mentioned Finding numbered V; and in this behalf, this petitioner for a new trial shows that said evidence fails to show that any of said bonds or shares of said stock of said Northwestern Portland Cement Company, said corporation, hereinabove and in said Finding numbered VI referred to, were [716] ever delivered to said Standard Portland Cement Corporation, or came into its possession, or under its control, or passed into its treasury; and in this behalf, this petitioner for a new trial further shows that said evidence discloses that said bonds and said shares of stock were delivered to and received by and passed into the treasury of said Northwestern Portland Cement Company; and in this behalf, this petitioner for a new trial further shows that said evidence fails to show that any of the above-mentioned promissory notes were made, executed or delivered for a valuable or any consideration, paid and delivered, or paid or delivered, by the respective or any payees or payee of said notes, or any of them, to said Standard Portland Cement Corporation on May 5, 1908, or at any other time, or at all.

10.

Said evidence is wholly insufficient to justify the Findings of the Referee herein, on which Findings the decision herein is based, and more particularly Finding numbered VII, wherein and whereby said Referee hath omitted to find upon every issue presented by the answer of said Standard Portland Cement Corporation in the above-entitled action, and hath found that the same issues were presented in

the equity suit numbered 15,249, in said Finding VII referred to, and that said issues were in said equity cause determined adversely to said Standard Portland Cement Corporation; and in this behalf this petitioner for a new trial herein shows that there was evidence before said Referee upon which the other issues referred to in said Finding VII should have been determined in the above-entitled action, whether involved in the aforesaid equity suit or not, that the adverse determination of said other issues in said equity suit was not warranted, justified [717] or sustained by the evidence in said equity suit, but was contrary to the evidence, and to the weight and effect of the evidence therein, and that said Referee should have found said issues in said equity suit numbered 15,249, favorably to said Standard Portland Cement Corporation.

11.

Said evidence is wholly insufficient to justify the Findings of the Referee herein, on which Findings the decision herein is based, and more particularly the Finding of said Referee that said plaintiffs are entitled to judgment against said defendants, and each of them, for the sum of \$39,000.00, together with interest at the rate of six per cent (6%) per annum, from the first day of May, 1908, compounded semi-annually, and for costs; and in this behalf, this petitioner for a new trial herein shows that said evidence discloses a valid defense on the part of said Standard Portland Cement Corporation in the above-entitled action, and that upon the *the* pleadings, evidence and record in said action said Standard Portland Cement

Corporation was entitled to findings and judgment in its favor and against said plaintiffs.

12.

The decision given and made in the above-entitled cause is contrary and against law because of errors of law occurring during the trial and excepted to by said Standard Portland Cement Corporation; and in this behalf, this petitioner for a new trial hereby makes express reference to the detailed specifications herein included in the Assignment of Errors under the aforesaid Ground Number 3, and makes them and each of them part and parcel of this specification. [718]

13.

Said decision is contrary to and against law, because of the insufficiency of the evidence to justify said decision; and said petitioner for a new trial hereby make express reference to the detailed specifications herein included in the Assignment of Errors under the aforesaid ground number 1, and makes them and each of them part and parcel of this specification.

14.

Said decision is contrary to and against law, because said Findings failed to find, but should have found, that the financial crisis for the year 1907 began in the spring of that year, and that during *the* 1907 and 1908 William J. Dingee was without funds wherewith to carry on any enterprise and was insolvent, and that said plaintiffs and their assignors received the par value of the bonds improperly found to have been purchased by said Standard

Portland Cement Corporation, together with accrued interest thereon, up to the date of the promissory notes in the above-mentioned Findings referred to.

15.

Said decision is contrary to and against law, because in and by said Findings it is found that said Standard Portland Cement Corporation has no valid defense against or in the above-entitled action, and is not entitled to any relief against the above-named plaintiffs, and that the above-named plaintiffs are entitled to judgment against said defendants in the manner and form stated in said Referee's Conclusions of Law in the above-entitled action; whereas said Referee hath failed to find, but should have found, that said defendants, and in particular Standard Portland Cement Corporation, have a valid defense in and to the above-entitled action, and are entitled to the relief prayed for in the [719] answers therein, and that the above-named plaintiffs should take nothing by their action herein, and that said defendants and each of them should have judgment herein for costs.

16.

Said decision is contrary to and against law, because it failed to grant the relief prayed for by said Standard Portland Cement Corporation, and was given, made and rendered in favor of the above-named plaintiffs and against the above-named defendants, and because said decision was and is contrary to the evidence and to the weight and effect of the evidence, and to the case made and stated in the

pleadings, evidence and record in the above-entitled action.

17.

Said decision is contrary to and against law, because upon the evidence received upon the hearing of said cause said Master and Referee erred in making his report and findings of fact and conclusions of law in favor of said plaintiff and against said defendants, and should have made his report and findings of fact and conclusions of law in favor of said defendants and against said plaintiffs.

18.

Said decision is contrary to and against law, because said Court erred in making and giving its order overruling the exceptions of said defendants, the Standard Portland Cement Corporation, to said report and findings of fact and conclusions of law of said Master and Referee; and erred in confirming said report and findings of fact and conclusions of law; and erred in directing judgment for said plaintiffs and against said defendants in accordance with said report; and said Court erred in failing to sustain said objections of said defendant, Standard Portland Cement Corporation, to said report, together with said findings of fact and conclusions of law, and erred [720] in failing to direct judgment in favor of said defendants and against said plaintiffs.

19.

Said decision was contrary to and against law, because said Court erred in making, giving, rendering and entering judgment herein, in favor of said

plaintiffs and against said defendants; and erred in failing to give, make, render and enter therein its judgment in favor of said defendants and against the said plaintiffs.

20.

The Referee in the above-entitled action erred in overruling the objection of said Standard Portland Cement Corporation to the following questions asked the witness Ernest E. Evans on cross-examination in his deposition now on file in the above-entitled action:

“Mr. Evans, at the time of the sale of the bonds and stocks of the Northwestern Portland Cement Co. to the Standard Portland Cement Corporation, had you considered in your own mind the value of the assets of the Northwestern Portland Cement Company?”

Said objection was made upon the ground that said question and the evidence sought to be elicited thereby were incompetent, immaterial and irrelevant, and not pertinent to any issue in the case and assuming a fact as to which there was no evidence, to wit, that there was any sale to the Standard Portland Cement Corporation, and calling for the secret, uncommunicated mental processes of the witness; said objection was overruled by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error. [721]

21.

Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Cor-

poration to strike out all of the testimony given by the witness Ernest E. Evans in his deposition now on file in the above-entitled action, relative to the values, and particularly to the value of any estate or assets of the Northwestern Portland Cement Company; said motion was made upon the ground that said testimony of said witness was incompetent, immaterial and irrelevant, without foundation,—it not appearing that the witness knew either the intrinsic value of the alleged assets or the market value thereof, and upon the ground that the answer as given was not responsive to the question asked. Said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

22.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness Ernest E. Evans on cross-examination in his deposition now on file in the above-entitled action:

“What figure, if any, did you put upon those assets?”

Said objection was made upon the grounds that said question and the evidence sought to be elicited thereby were incompetent, immaterial and irrelevant, and not pertinent to any issue in the case and assuming a fact as to which there was no evidence, to wit, that there was any sale to the Standard Portland Cement Corporation, and calling for the secret, uncommunicated mental processes of the witness,

and upon the further ground that his mental condition, or mental processes, beliefs, or private opinions, uncommunicated, are immaterial to any issue in this case, and do not constitute any fact or facts [722] by which said Standard Portland Cement Corporation could or should be bound; said objection was overruled by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

23.

Said Referee erred in receiving and in denying the motion of said Standard Portland Cement Corporation to strike out the following answer given by the witness Ernest E. Evans on his cross-examination in his deposition now on file in the above-entitled action:

“Well, I considered that they were worth between \$240,000 and \$250,000; that is, if the Company were liquidated.”

Said motion was made upon all the grounds stated in the objection mentioned in the last preceding paragraph herein, and upon the further ground that said answer was purely speculative. Said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

24.

Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation to strike out, the following answer given by

the witness Ernest E. Evans on cross-examination in his deposition now on file in the above-entitled action, in response to the question:

“By ‘liquidated’ you mean, namely, That is to say, if the company went into liquidation, and the assets were sold, they would realize between \$240,000 and \$250,000, but as a going concern I considered that it was worth par easily, because the money which was actually spent in construction [723] would have to be spent anyhow.”

Said motion was made upon all the grounds enumerated in paragraph 22 hereof, and upon the further ground that said answer is not responsive to the question asked, and upon the further ground that the witness was merely speculating as to possibilities, and not stating a fact, but making an argument; said motion was denied by said Referee, to which ruling the said Standard Portland Cement Corporation duly excepted and now assigns the same as error.

25.

Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation to strike out the following passage from the testimony given by the witness, Ernest E. Evans, on cross-examination in his deposition now on file in the above-entitled action:

“Q. Considering the concern as a going concern, or as a concern the owners of which contemplated going ahead with it, would you have *out* a different figures upon the assets?

A. Certainly, the going ahead with it; I would consider it fully worth par."

Said motion was made upon all the grounds heretofore stated in paragraph 22 hereof and in the last preceding paragraph hereof. Said motion was denied by said referee, to which ruling said Standard Portland Cement Corporation duly excepted and now assigns the same as error.

26.

Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation to strike out, the following passage from the testimony given by the witness Ernest E. Evans on cross-examination in his deposition now on file in the above-entitled action: [724]

"Q. At the time referred to of the sale of your stocks and bonds to the Standard Portland Cement Corporation, did you have any information as to the plans of Mr. Dingee or Mr. Bachman for going ahead, or not going ahead with the Northwestern Cement Company? A. Yes; I distinctly understood all along that they were going ahead with this, only they had stopped it owing to the financial panic until things settled down again, and at the time that I met Dr. Bachman when he went to examine the property, of course, we spent the evening together, and he distinctly stated this Northwestern Portland Cement Company was to be eventually amalgamated with the Santa Cruz and the Standard Portland Cement Corporation."

Said motion was made upon all the grounds heretofore enumerated in the previous paragraphs herein, and upon the further grounds that the above mentioned answer was incompetent, immaterial and irrelevant, not responsive, involving hearsay, *ex parte* declarations of persons by whose statements the above-named Standard Portland Cement Corporation would not be bound or should not be bound, and not proper cross-examination. Said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

27.

Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation to strike out, the following [725] passage from the testimony given by the witness Ernest E. Evans on cross-examination in his deposition now on file in the above-entitled action:

“What interest, if any, did you understand the Standard Portland Cement Company had in the Northwestern Cement Company? A. Well, the idea of starting the Northwestern Company was strategic, and with the idea of protecting the other factories.”

Said motion was made upon all the grounds heretofore stated in the last preceding paragraph hereof. Said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

28.

Said Referee erred in receiving, and denying the motion of said Standard Portland Cement Corporation to strike out, a portion of the following passage from the testimony given by the witness John L. Howard on cross-examination upon the hearing in the above-entitled action:

“Q. At the time of the purchase of the bonds of the Northwestern Portland Cement Company by the Standard Portland Cement Corporation was anything said by Mr. Dingee as to the plans of the Standard Portland Cement Corporation relative to the Northwestern? A. I don’t recall that he said anything at that time, but both he and Bachman had frequently spoken of it before.”

Said motion was made upon the grounds that the latter half of the foregoing answer was not responsive to the question asked. Said motion was denied by said Referee, to which ruling said Standard [726] Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

29.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness John L. Howard on cross-examination upon the hearing of the above-entitled action:

“Q. I call your attention to Defendant’s Exhibit 2, and to the letter therein by the Standard Portland Cement Corporation to the Western

Fuel Company dated March 8, 1906, and to the assignment therein dated June 30, 1906, by the Western Fuel Company to the Western Building Material Company of the sales contract between the Western Fuel Company and the Standard Portland Cement Company, and to the consent therein of such assignment by the Standard Portland Cement Company, and ask you what is the explanation of the provision in the letter and assignment to the effect that the sales contract may at any time be terminated at the option of the Standard Portland Cement Company in case you yourself should cease at any time to be the general executive office of the Western Fuel Company or the Western Building Material Company?"

Said objection was made upon the ground that said question and the testimony sought to be elicited thereby were immaterial, irrelevant and incompetent, not proper cross-examination, without foundation in this, that it does not appear that the witness knows, and an attempt to vary the terms of a written instrument of parol [727] evidence. Said objection was overruled by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

30.

Said Referee erred in sustaining the objection of the above-named plaintiffs to the following questions asked the witness John L. Howard upon the hearing

of the above-entitled matter:

“Q. Now, it appeared, then, at that time that you were in doubt whether you learned of that at the time of the Wenzelburger report or whether you learned of it later?”

Said objection was made upon the ground that said question assumes something that is not in the case. Said objection was sustained by said Referee, to which ruling said Standard Cement Corporation then and there duly excepted and now assigns the same as error.

31.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness Foster Young upon the hearing in the above-entitled action:

“Q. But you understood, anyhow, did you not that he came there in accordance with the letter of May 4, 1908?”

Said objection was made upon the ground that said question and the testimony sought to be elicited thereby was incompetent and not proper cross-examination, and upon the further ground that the understanding of the witness is not in evidence. Said objection was overruled by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

32.

Said Referee erred in granting the motion of the above-named [728] plaintiffs to strike out from

the record in the above-entitled action the minute-book of the Northwestern Portland Cement Corporation, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

33.

Said Referee erred in sustaining the objection of the above-named plaintiffs to the introduction in evidence upon the hearing of the above-entitled action of the book containing the bond account and record of subscriptions and sales of bonds of the Northwestern Portland Cement Company. Said objection was made upon the ground that said book was incompetent, immaterial, hearsay, and not the best evidence. Said objection was sustained by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

34.

Said Referee erred in sustaining the objection of the above-named plaintiffs to the receiving in evidence upon the hearing of the above-entitled action of the memorandum slip in the handwriting of William J. Dingee showing the subscription for the bonds of the Northwestern Portland Cement Company. Said objection was made upon the ground that said memorandum slip was incompetent, hearsay and not binding upon any of the parties to this action, and not within the knowledge of the witness. Said objection was sustained by said Referee, to which ruling said Standard Portland Cement Corporation

then and there duly excepted and now assigns the same as error.

35.

Said Referee erred in sustaining the objection of the above-named plaintiffs to the following question asked the witness Foster Young during the hearing of the above-entitled action:

“Q. Has there ever been any question in your mind as to whether you held those [729] bonds to the order of the Standard Portland Cement Corporation?”

Said objection was made upon the ground that said question was incompetent and immaterial and calling for the opinion and view of the witness. Said objection was sustained by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

36.

Said Referee erred in sustaining the objection of the above-named plaintiffs to the following question asked the witness Foster Young during the hearing of the above-entitled action:

“Q. Have you ever regarded the Standard Portland Cement Corporation as in any manner the owner of those bonds?”

Said objection was made upon the ground that said question was incompetent and immaterial and calling for the opinion and view of the witness. Said objection was sustained by said Referee, to which ruling said Standard Portland Cement Corporation then

and there duly excepted and now assigns the same as error.

37.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness John L. Howard upon the hearing of the above-entitled action:

“Mr. Howard, will you state to the Court what evidences of lime there were in this ground in Washington which was finally acquired by the Northwestern Portland Cement Company?”

Said objection was made upon the ground that said question and the testimony sought to be elicited thereby were immaterial, irrelevant and incompetent, and without foundation in this, that it was shown the [730] witness is incompetent, and upon the further ground that it was not a proper subject matter in any event for statement by the witness—he not having been shown to have been experienced in the line to which the inquiry was addressed, and upon the further ground that the witness was a general merchant and neither a geologist nor an expert upon these matters, and upon the further ground that it already appeared that the witness had not been actually on the spot. Said objection was overruled by said Referee, to which ruling the said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

38.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the

following question asked the witness John L. Howard at the hearing of the above-entitled action:

“What was its extent?”

Said objection was made upon the ground that no foundation had been laid, in this, that it did not appear that the witness knew. Said objection was overruled by said Referee, to which ruling the said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error; and in this behalf this defendant, Standard Portland Cement Corporation, further assigns as error the ruling of said Referee admitting general statements by said witness John L. Howard as to the extent and size of the above-mentioned lime deposits.

39.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness John L. Howard during the hearing of the above-entitled action:

“Did this acceptance or any other acceptance by the Western Fuel Company in favor of either the Standard Cement Corporation or the Santa Cruz Portland Cement Company [731] have anything to do or play any part in connection with the sale of the bonds of the Northwestern Portland Cement Company involved in this transaction?”

Said objection was made upon the grounds that said question and the testimony sought to be elicited thereby were immaterial, irrelevant and incompetent, and calling for the opinion and private judgment of the witness, and upon the further ground that the

witness had already testified that he had no recollection as to anything else effecting these acceptances except what appeared in the paper itself. Said objection was overruled by said Referee, to which ruling said Standard Portland Cement Corporation, then and there duly excepted and now assigns the same as error.

40.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness John L. Howard during the hearing of the above-entitled action:

“Q. What knowledge or information did you have as to any intention on the part of Mr. Dingee that the bonds and stock of the Northwestern Portland Cement Company purchased by the Standard Portland Cement Corporation were not to be held by the latter company, but were to be turned over to the Northwestern Company?”

Said objection was made upon the ground that the question asked and the testimony sought to be elicited thereby were incompetent, being an effort to establish the intention of one person by the statements of another person. Said objection was overruled by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error. [732]

41.

Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation to strike out, the following passage from the testimony given by the witness John L. Howard

during the hearing of the above-entitled action:

“Q. What knowledge or information did you have as to the actual disposition of the bonds and stock of the Northwestern that was sold to the Standard Portland Cement Corporation?

A. The only knowledge that I had was the fact of their delivery by Mr. Norcross to Mr. Young. Beyond that nothing.”

Said motion to strike out was made upon ground that the question asked and answer calls for and states the conclusion of the witness, on the further ground that it does not appear that the witness had any or real personal knowledge upon the subject, and upon the further ground that he testified from hearsay only. Said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

42.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness Sidney V. Smith upon his direct examination during the hearing of the above-entitled action:

“Q. What took place at that interview as you remember it?”

Said objection was made upon the ground that the question and the testimony sought to be elicited thereby were immaterial, irrelevant and incompetent, and calling for hearsay, and upon the further ground that it did not appear that the party or parties sought to be charged [733] with what took place

at that interview, or any representative of them was present thereat, and upon the further ground that as against the Northwestern Portland Cement Company, and particularly against the Standard Portland Cement Corporation that the proffered evidence was *res inter alios acta*, and self-serving. Said objection was overruled by said Referee, to which ruling the said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

43.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness Ernest E. Evans during the hearing of the above-entitled action:

“Q. Mr. Evans state whether or not at the first interview which you and Mr. Spencer and Mr. Smith had with Mr. Howard in March, 1908, any proposal or suggestion was made to you and the other gentlemen with you, by Mr. Howard, as to any plan of relieving you of your investments in the Northwestern Portland Cement Company?”

Said objection was made upon the ground that said question was leading and suggestive. Said objection was overruled by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

44.

Said Referee erred in finding that said Standard Portland Cement Corporation has no valid defense against or in the above-entitled action, and is not en-

titled to any relief against the above-named plaintiffs, and that the above-named plaintiffs are entitled to a judgment against said defendants in the manner and form stated in said Referee's Conclusions of Law in the above-entitled action; to [734] which said findings by said Referee, said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

45.

Said Referee erred in failing to find, but should have found, that said Standard Portland Cement Corporation has a valid defense in and to the above-entitled action, and is entitled to the relief prayed for in his answer therein; and failed to find, but should have found, that the above-named plaintiffs should take nothing by their action herein, and that said Standard Portland Cement Corporation should have judgment herein for its costs; which said action by said Referee this petitioner for a new trial now assigns as error.

46.

Said Referee erred in not granting the relief prayed for by this petitioner, and in giving, making and rendering his report and findings in favor of the above-named plaintiffs and against this petitioner for a new trial; and erred in not giving, making and rendering his report and findings in the above-entitled cause in favor of this petitioner, and against the above-named plaintiffs; and erred in giving, making and rendering his report and findings in the above-entitled cause in favor of said plaintiffs and against said defendants upon the pleadings, evidence and

record in the above-entitled action; all of which said action by said Referee, this petitioner for a new trial now assigns as error.

47.

Said Referee erred in giving, making and rendering his report and findings in the above-entitled cause in favor of said plaintiffs and against said defendants, in this, that said report and findings, and each and all of them, were and was and are and is contrary to law, not warranted, justified or sustained by the evidence, and contrary to the evidence and to the weight and effect of the evidence and to [735] *the weight and effect of the evidence and to* the case made and stated in the pleadings, evidence and record in the above-entitled cause; all of which this petitioner for a new trial now assigns as error.

48.

Said District (Circuit) Court erred in overruling the objections and exceptions of said Standard Portland Cement Corporation to said report and findings of said Referee in confirming said report and findings of said Referee, and in ordering judgment in the above-entitled action in conformity with said report and findings; to all of which said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

49.

Said District (Circuit) Court erred in giving, making, rendering and entering its judgment in the above-entitled action in favor of said plaintiffs and against said defendants, in conformity with said report and findings of said Referee; to all of which

said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

WHEREFORE, the said Standard Portland Cement Corporation, a corporation, plaintiff in error herein, prays that the judgment of the above-entitled court be reversed, and that said Court be directed to grant a new trial of said cause.

Dated, San Francisco, California, July 25th, A. D. 1912.

J. J. DUNNE,
MORRISON, COPE & BROBECK,
MORRISON, DUNNE & BROBECK,
Attorneys for said Plaintiff in Error.

[Endorsed]: Filed Jul. 25, 1912. Jas. P. Brown,
Clerk. By J. A. Schaertzer, Deputy Clerk. [736]

*In the District Court of the United States in and for
the Northern District of California, Second
Division.*

No. 14,887.

ERNEST E. EVANS, GEORGE COLEMAN and
PERCY W. EVANS, Partners Doing Business Under the Firm Name of EVANS,
COLEMAN and EVANS,

Plaintiffs,

vs.

STANDARD PORTLAND CEMENT CORPORATION, a Corporation, WILLIAM J. DINGEE and IRVING A. BACHMAN,

Defendants.

Summons and Severance.

To William J. Dingee and Irving A. Bachman:

You, and each of you, are hereby invited to join with the undersigned to prosecute a writ of error in the above-entitled cause from the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit to the United States District Court in and for the Northern District of California in said Ninth Judicial Circuit, to reverse the judgment in the above-entitled cause given, made and rendered against you and the undersigned on the 24th day of April, 1912, or you will be deemed to have acquiesced in the said judgment and the undersigned shall prosecute said writ of error without joining you as parties.

STANDARD PORTLAND CEMENT CORPORATION, a Corporation,

By Its Attorneys

J. J. DUNNE,

MORRISON, COPE & BROBECK,

MORRISON, DUNNE & BROBECK.

Service of the above and foregoing is hereby accepted, this 9th day of August, 1912.

WILLIAM J. DINGEE,

By W. M. CANNON,

His Attorney.

IRVING A. BACHMAN,

By F. B. LORIGAN,

His Attorney. [737]

Refusal to Join in Writ of Error.

Now come William J. Dingee and Irving A. Bachman, defendants in the above-entitled cause, and refuse to join with Standard Portland Cement Corporation, a corporation, in prosecuting a writ of error from the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit to the United States District Court in and for the Northern District of California in said Ninth Judicial Circuit, as invited in the above and foregoing "SUMMONS AND SEVERANCE" to reverse the judgment in the above-entitled cause, given, made and rendered against said Standard Portland Cement Corporation, a corporation, and themselves on the 24th day of April, 1912.

WILLIAM J. DINGEE,

By W. M. CANNON,

His Attorney.

IRVING A. BACHMAN,

By F. B. LORIGAN,

His Attorney.

Dated San Francisco, August 9th, 1912.

Service admitted this 9th August, 1912.

J. R. SEVERANCE,

PAGE, McCUTCHEON, KNIGHT & OLNEY,

Attorneys for Defendants in Error.

[Endorsed]: Filed Aug. 9, 1912. Jas. P. Brown,
Clerk. By W. B. Maling, Deputy Clerk. [738]

*In the District Court of the United States in and for
the Northern District of California, Second
Division.*

No. 14,887.

ERNEST E. EVANS, GEORGE COLEMAN and
PERCY W. EVANS, Partners Doing Busi-
ness Under the Firm Name of EVANS,
COLEMAN and EVANS,

Plaintiffs,

vs.

STANDARD PORTLAND CEMENT CORPORA-
TION, a Corporation, WILLIAM J. DIN-
GEE and IRVING A. BACHMAN,

Defendants.

Order Allowing Writ of Error.

At a stated term, to wit, the July term, A. D. 1912,
of the above-entitled court, held at its courtroom in
the City and County of San Francisco, State of Cali-
fornia, on the ninth day of August, A. D. 1912.

Present: The Honorable W. C. VAN FLEET,
Judge of said court.

Upon the petition of Standard Portland Cement
Corporation, a corporation, and on the motion of J.
J. Dunne, Esquire:

IT IS HEREBY ORDERED that a Writ of
Error to the United States Circuit Court of Appeals
for the Ninth Circuit, at the City and County of San
Francisco, State of California, from the final judg-
ment heretofore given, made, filed and entered in and
by the above-named court, in the above-entitled
cause, upon the issues therein joined, under date of

1048 *Standard Portland Cement Corporation*

April 24th, A. D. 1912, be and the same is hereby, allowed; and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings herein, be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

Dated: San Francisco, Cal., August 9th, A. D. 1912.

WM. C. VAN FLEET,

Judge of Said Court.

Service admitted this 9th August, 1912.

J. R. PRINGLE,

PAGE, McCUTCHEON, KNIGHT & OLNEY,

Attorneys for Said Plaintiffs.

[Endorsed]: Filed Aug. 9, 1912. Jas. P. Brown,
Clerk. W. B. Maling, Deputy. [739]

*In the District Court of the United States in and for
the Northern District of California, Second
Division.*

No. 14,887.

ERNEST E. EVANS, GEORGE COLEMAN and
PERCY W. EVANS, Partners Doing Business Under the Firm Name of EVANS,
COLEMAN and EVANS,

Plaintiffs,

vs.

STANDARD PORTLAND CEMENT CORPORATION, a Corporation, WILLIAM J. DINGEE and IRVING A. BACHMAN,

Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, That we, Standard Portland Cement Corporation, a corporation as principal, and Equitable Surety Company of St. Louis, Missouri, as surety, are held and firmly bound unto the defendants in error, Ernest E. Evans, George Coleman, and Percy W. Evans, partners doing business under the firm name of Evans, Coleman and Evans, in the full and just sum of Sixty Thousand Dollars (\$60,000.00), to be paid to said defendants in error, their certain attorneys, executors, administrators and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors jointly and severally by these presents.

Sealed with our seals and dated this ninth day of August in the year of our Lord One Thousand Nine Hundred and Twelve.

WHEREAS, lately at a Circuit Court of the United States, Ninth General Circuit, Northern District of California, in a suit depending in said court between Ernest E. Evans, George Coleman and Percy W. Evans, partners doing business under the firm name of Evans, Coleman and Evans, plaintiffs, and Standard Portland Cement Corporation, a corporation, William J. Dingee and Irving Bachman, defendants, a judgment was rendered against said defendants and the said defendants [740] having obtained a Writ of Error and filed a copy thereof in the Clerk's office of the said court, to reverse a judgment in the aforesaid suit, and a Citation directed to the said plaintiffs citing and admonishing them to be and ap-

pear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City and County of San Francisco, State of California, in said circuit, on the 7th day of September, A. D. 1912:

Now, the condition of the above obligation is such, that if the said defendants shall prosecute said Writ of Error to effect and answer all damages and costs if they fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

STANDARD PORTLAND CEMENT CORP.

[Seal]

By GEO. T. CAMERON,

President.

By L. F. YOUNG,

Secretary.

EQUITABLE SURETY COMPANY,

[Seal]

By HERBERT B. GEE,

Attorney-in-fact.

We make no objection to the form or sufficiency of this bond.

PAGE, McCUTCHEON, KNIGHT & OLNEY,

[Endorsed]: Filed Aug. 9, 1912. Jas. P. Brown,
Clerk. By W. B. Maling, Deputy Clerk. [741]

*In the District Court of the United States in and for
the Northern District of California, Second
Division.*

No. 14,887.

ERNEST E. EVANS, GEORGE COLEMAN and
PERCY W. EVANS, Partners Doing Busi-
ness Under the Firm Name of EVANS,
COLEMAN and EVANS,

Plaintiffs,

vs.

STANDARD PORTLAND CEMENT CORPORA-
TION, a Corporation, WILLIAM J. DIN-
GEE and IRVING A. BACHMAN,

Defendants.

**Stipulation [Waiving Objections to Writ of Error
and Bill of Exceptions, etc.].**

WHEREAS, Standard Portland Cement Corpora-
tion, a corporation one of the defendants above-
named, has heretofore, within due time prepared and
served the above-named plaintiffs, a draft of its pro-
posed bill of exceptions to be used upon its writ of
error to the above-entitled court;

AND WHEREAS, the above-named plaintiffs
have not as yet presented their proposed amend-
ments to said draft;

AND WHEREAS, said Standard Portland Ce-
ment Corporation, a corporation, has on this 9th day
of August, 1912, sued out its said writ of error in the
above-entitled cause from the United States Circuit
Court of Appeals in and for the Ninth Judicial Cir-
cuit to the United States District Court in and for

the Northern District of California, in said Ninth Judicial Circuit, to reverse the judgment in the above-entitled cause given, made and rendered on April 24th, 1912:

NOW, THEREFORE, it is hereby stipulated, agreed and consented to by all of the above-named parties in manner following, to wit:

All objections to said writ of error and to said bill of exceptions upon the ground that said bill of exceptions was not settled, allowed, approved, signed or authenticated prior to the suing out of [742] said writ of error, are hereby waived; and said bill of exceptions may be hereafter settled, allowed, approved, signed and authenticated *nunc pro tunc* as of the date of the suing out of said writ of error; and said bill of exceptions, upon its allowance, settlement, approval, signing and authentication hereafter, shall have the same force, effect and validity as if actually settled, allowed, approved, signed and authenticated upon said date.

This stipulation is intended by the parties to evidence of record their consent to the settlement, allowance, approval, signing and authentication of said bill of exceptions notwithstanding that said writ of error has already been sued out.

J. R. PRINGLE,

PAGE, McCUTCHEON, KNIGHT &
OLNEY,

Attorneys for Plaintiffs and Defendants in Error.

J. J. DUNNE,

MORRISON, COPE & BROBECK,

MORRISON, DUNNE & BROBECK,

Attorneys for Plaintiffs in Error.

[Endorsed]: Filed Aug. 9, 1912. Jas. P. Brown,
Clerk. By W. B. Maling, Deputy Clerk. [743]

**[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]**

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 14,887.

ERNEST E. EVANS, GEORGE COLEMAN and
PERCEY W. EVANS, Partners Doing Busi-
ness Under the Firm Name of EVANS,
COLEMAN and EVANS,

Plaintiffs,

vs.

STANDARD PORTLAND CEMENT CORPORA-
TION, a Corporation, WILLIAM J.
DINGEE and IRVING A. BACHMAN,
Defendants.

I. W. B. Maling, Clerk of the District Court of the
United States, in and for the Northern District of
California, do hereby certify the foregoing seven
hundred and forty-three (743) pages, numbered from
1 to 743, inclusive, to be a full, true and correct copy
of the record and proceedings in the above and
therein entitled cause, as the same remains of record
and on file in the office of the Clerk of said court,
and that the same constitutes the return to the an-
nexed Writ of Error.

I further certify that the cost of the foregoing
return to Writ of Error is \$538.20, that said amount

was paid by J. J. Dunne and Morrison, Dunne & Brobeck, attorneys for the Standard Portland Cement Corporation, defendant, and that the original Writ of Error and citation issued in said cause are hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, this 30th day of December, A. D. 1912.

[Seal] W. B. MALING,
Clerk of United States District Court, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk. [744]

In the District Court of the United States in and for the Northern District of California, Second Division.

No. 14,887.

ERNEST E. EVANS, GEORGE COLEMAN and
PERCY W. EVANS, Partners Doing Business Under the Firm Name of EVANS,
COLEMAN and EVANS,

Plaintiffs,

vs.

STANDARD PORTLAND CEMENT CORPORATION, a Corporation, WILLIAM J. DINGEE and IRVING A. BACHMAN,
Defendants.

Writ of Error.

United States of America,—ss.

The President of the United States: To the Honor-

able W. C. VAN FLEET, Judge of the Above-entitled Court, Greeting:

Because in the record and proceedings, as also in the giving, making and rendition, entry and filing of the final judgment in that certain cause in the above-entitled court, before you, between the above-named plaintiffs and the above-named defendants, a manifest error hath happened to the great prejudice and damage of said Standard Portland Cement Corporation, a corporation, as is stated and appears by the petition herein:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid, in this behalf do command you, if justice be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justice of the United States [745] Circuit Court of Appeals for the Ninth Circuit, in the City and County of San Francisco, in the State of California, together with this Writ, so as to have the same at the said place in the said Circuit on the 7th day of September, A. D. 1912, that the said records and proceedings being inspected the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 9th day of August, A. D. 1912.

Attest my hand and the seal of the above-entitled

court, at the Clerk's office thereof in the City and County of San Francisco, State of California, on the day and year last above written.

[Seal]

JAS. P. BROWN,
Clerk of Said Court.
By W. B. Maling,
Deputy Clerk.

Allowed this 9th day of August, A. D. 1912.

WM. C. VAN FLEET.
Judge of Said Court.

Service admitted this 9th August, 1912.

J. R. PRINGLE,
PAGE, McCUTCHEN, KNIGHT & OLNEY,
Attorneys for Defendants in Error. [746]

[Endorsed]: 14,887. U. S. District Court, Northern District of California. Ernest E. Evans et al., Plaintiffs, vs. Standard Portland Cement Corporation, a Corporation, et al., Defendants. Writ of Error. Filed Aug. 9, 1912. Jas. P. Brown, Clerk. By W. B. Maling, Deputy Clerk. [746½]

[Answer to Writ of Error.]

The answer of the Judges of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place

contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

W. B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [747]

In the District Court of the United States in and for the Northern District of California, Second Division.

No. 14,887.

ERNEST E. EVANS, GEORGE COLEMAN and
PERCY W. EVANS, Partners Doing Business Under the Firm Name of EVANS,
COLEMAN and EVANS,

Plaintiffs,

vs.

STANDARD PORTLAND CEMENT CORPORATION, a Corporation, WILLIAM J. DINGEE and IRVING A. BACHMAN,
Defendants.

Citation.

The United States of America,—ss.

The President of the United States, to the Above-named Plaintiffs and to Their Attorneys,
Greeting:

You, and each of you, are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, within thirty

(30) days from the date of this writ, pursuant to a Writ of Error filed in the Clerk's office of the above-named court, wherein said Standard Portland Cement Corporation, a corporation is plaintiff in error and you are defendants in error, to show cause, if any there be, why the final judgment in said Writ of Error mentioned, and from which said Writ of Error has been allowed, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, [748] this 9th day of August, in the year of our Lord One Thousand Nine Hundred and Twelve, and of the Independence of the United States the One Hundred and Thirty-sixth.

WM. C. VAN FLEET,

Judge of the Above-entitled Court.

[Seal]

Attest: JAS. P. BROWN,

Clerk of the Above-entitled Court.

By W. B. Maling,

Deputy Clerk.

Service admitted this 9th August, 1912.

J. R. PRINGLE,

PAGE, McCUTCHEN, KNIGHT & OLNEY,

Attorneys for Defendants in Error. [749]

[Endorsed]: 14,887. U. S. District Court, Northern District of California. Ernest E. Evans et al., Plaintiffs, vs. Standard Portland Cement Corporation, a Corporation, et al., Defendants. Citation. Filed Aug. 9, 1912. Jas. P. Brown, Clerk. By W. B. Maling, Deputy Clerk. [750]

[Endorsed]: No. 2235. United States Circuit Court of Appeals for the Ninth Circuit. Standard Portland Cement Corporation, a Corporation, Plaintiff in Error, vs. Ernest E. Evans, George Coleman and Percy W. Evans, Partners Doing Business Under the Firm Name of Evans, Coleman and Evans, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed December 30, 1912.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

1060 *Standard Portland Cement Corporation*

[Order Enlarging Time to October 2, 1912, to File
Record, etc.]

*In the United States Circuit Court of Appeals, Ninth
Circuit.*

No. —

STANDARD PORTLAND CEMENT CORPORA-
TION, a Corporation, WILLIAM J.
DINGEE and IRVING A. BACHMAN,
Plaintiff in Error,

vs.

ERNEST E. EVANS, GEORGE COLEMAN and
PERCY W. EVANS, Partners Doing Busi-
ness Under the Firm Name of EVANS,
COLEMAN and EVANS,
Defendants in Error.

ORDER EXTENDING TIME TO FILE RECORD
THEREOF AND DOCKET CAUSE.

Good cause appearing therefor, it is ordered that
the plaintiff in error in the above-entitled cause may
have to and including October 2, 1912, within which
to file its record on writ of error and to docket the
cause in the United States Circuit Court of Appeals
for the Ninth Circuit.

Dated September 5, 1912.

WM. C. VAN FLEET,
United States District Judge, Northern District of
California.

[Endorsed]: No. 2235. United States Circuit
Court of Appeals for the Ninth Circuit. Order
Under Rule 16 Enlarging Time to Oct. 2, 1912, to

File Record Thereof and to Docket Case. Filed
Sep. 5, 1912. F. D. Monckton, Clerk.

**[Order Enlarging Time to November 1, 1912, to File
Record, etc.]**

*In the United States Circuit Court of Appeals, Ninth
Circuit.*

No. —.

STANDARD PORTLAND CEMENT CORPORA-
TION, a Corporation, WILLIAM J.
DINGEE and IRVING A. BACHMAN,
Plaintiff in Error,

vs.

ERNEST E. EVANS, GEORGE COLEMAN and
PERCY W. EVANS, Partners Doing Busi-
ness Under the Firm Name of EVANS,
COLEMAN and EVANS,
Defendants in Error.

**ORDER EXTENDING TIME TO FILE RECORD
THEREOF AND DOCKET CAUSE.**

Good cause appearing therefor, it is ordered that
the plaintiff in error in the above-entitled cause may
have to and including November 1, 1912, within
which to file its record on writ of error and to docket
the cause in the United States Circuit Court of Ap-
peals for the Ninth Circuit.

Dated October 2, 1912.

WM. C. VAN FLEET,
United States District Judge, Northern District of
California.

[Endorsed]: No. 2235. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Nov. 1, 1912, to File Record Thereof and to Docket Case. Filed Oct. 2, 1912. F. D. Monckton, Clerk.

[Order Enlarging Time to November 30, 1912, to File Record, etc.]

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. —.

STANDARD PORTLAND CEMENT CORPORATION, a Corporation, WILLIAM J. DINGEE and IRVING A. BACHMAN,
Plaintiff in Error,

vs.

ERNEST E. EVANS, GEORGE COLEMAN and PERCY W. EVANS, Partners Doing Business Under the Firm Name of EVANS, COLEMAN and EVANS,

Defendants in Error.

ORDER EXTENDING TIME TO FILE RECORD THEREOF AND DOCKET CAUSE.

Good cause appearing therefor, it is ordered that the plaintiff in error in the above-entitled cause may have to and including November 30, 1912, within which to file the record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated October 31, 1912.

WM. W. MORROW,
United States Circuit Judge, Ninth Judicial Circuit.

[Endorsed]: No. 2235. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Nov. 30, 1912, to File Record Thereof and to Docket Case. Filed Oct. 31, 1912. F. D. Monckton, Clerk.

**[Order Enlarging Time to December 30, 1912, to File
Record, etc.]**

*In the United States Circuit Court of Appeals, Ninth
Circuit.*

No. —.

STANDARD PORTLAND CEMENT CORPORA-
TION, a Corporation, WILLIAM J.
DINGEE and IRVING A. BACHMAN,
Plaintiff in Error,

vs.

ERNEST E. EVANS, GEORGE COLEMAN and
PERCY W. EVANS, Partners Doing Busi-
ness Under the Firm Name of EVANS,
COLEMAN and EVANS,
Defendants in Error.

**ORDER EXTENDING TIME TO FILE RECORD
THEREOF AND DOCKET CAUSE.**

Good cause appearing therefor, it is ordered that the plaintiff in error in the above-entitled cause may have to and including December 30, 1912, within which to file its record on writ of error and to docket

the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated November 29, 1912.

WM. C. VAN FLEET,
United States District Judge, Northern District of
California.

[Endorsed]: No. 2235. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Dec. 30, 1912, to File Record Thereof and to Docket Case. Filed Nov. 29, 1912. F. D. Monckton, Clerk.

No. 2235. United States Circuit Court of Appeals for the Ninth Circuit. Four Orders Under Rule 16 Enlarging Time to Dec. 30, 1912, to File Record Thereof and to Docket Case. Refiled Dec. 30, 1912. F. D. Monckton, Clerk.

2
No. 2235.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

NORTHERN DISTRICT OF CALIFORNIA.

STANDARD PORTLAND CEMENT CORPORA-
TION, a Corporation,
Plaintiff in Error,

vs.

EVANS, COLEMAN & EVANS, et al.,
Defendants in Error.

Brief for Plaintiff in Error.

MORRISON, DUNNE & BROBECK,
J. J. DUNNE,
Counsel for Standard Portland Cement Corporation.

PRINTED BY THE JAMES H. BARRY CO.

FILED

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

NORTHERN DISTRICT OF CALIFORNIA.

STANDARD PORTLAND CEMENT CORPORATION, a corporation, <i>Plaintiff in error,</i>	}	No. 2235
vs.		
EVANS, COLEMAN & EVANS, ET AL., <i>Defendants in error.</i>		

BRIEF FOR PLAINTIFF IN ERROR.

GENERAL STATEMENT OF THE CASE.

This cause comes up from the Circuit Court of the United States, Ninth Circuit, Northern District of California. Originally, a law action was brought upon certain promissory notes claimed to have been executed by the Standard Portland Cement Corporation: to this action certain equitable defenses were

interposed; but a more enlarged consideration of the situation revealed the inhibition placed by Federal practice upon the interposition of equitable defenses to actions at law (*Levy vs. Matthews*, 145 Fed., 152). In line with the hint given by the Supreme Court (*Burns vs. Scott*, 117 U. S., 582), that the relief to be sought by the defendants in the action at law would be an injunction to stay the suit at law upon the notes pending the determination of the equitable defenses, the equity suit was commenced: but by arrangement with counsel, the whole controversy was litigated at once, the parties throughout being the same, and being the original parties. Stated in the most general terms, the claim of the law plaintiffs and equity defendants rests upon these alleged corporate notes: the claims of the law defendants and the equity complainants rests upon several propositions; such as the antagonism of the notes to settled public policy, the absence of consideration for the notes, the failure of delivery of any bonds or stocks to the Standard Portland Cement Corporation, the inequity of notes which are the progeny of corporate fraud and breach of trust, and the participation by the equity defendants in such corporate fraud and breach of trust; and the prayer of the Standard Portland Cement Corporation was that it be protected from the participated breach of trust of which it was a victim.

What are the general features of this controversy?

A. Incorporation of the Cement Companies.

Standard Portland Cement Co.:

Incorporated, 1902, Jan. 27.

What Law: California.

Place of business: San Francisco.

Occupation: Manufacture and sale of Portland Cement.

Principal Officers: Dingee and Bachman.

Santa Cruz Portland Cement Co.:

Incorporated, 1905, June 2.

What Law: California.

Place of Business: San Francisco.

Occupation: Manufacture and sale of Portland Cement.

Principal Officers: Dingee and Bachman.

Standard Portland Cement Corporation:

Incorporated, 1907, Feb. 25.

What Law: California.

Place of Business: San Francisco.

Occupation: Manufacture and sale of Portland Cement.

Principal Officers: Dingee and Bachman.

And these Companies were dominated by Dingee: his was the controlling personality.

Howard concedes that Dingee did not surrender

this control until the latter part of 1908. Evans makes no attempt to dispute Dingee's control (Record, Vol. I, p. 135); and no man of the world looking over the testimony and correspondence in this cause could have any reasonable doubt as to Dingee's "unquestioned" control,—to employ Evans' phraseology.

B. The Sales Agency Companies. These were two.

Originally: *The Western Fuel Co.*, of which Howard was and still is President.

By Assignment: *The Western Building Materials Co.*, of which, also, Howard is President.

The Western Building Materials Co. is a mere offshoot from, or appendage to, the Western Fuel Co., and controlled by the latter, and this is admitted by Howard in his testimony on page 78 of the record.

C. The Relations between the Cement Companies and the Sales Agency Companies.

These relations are exhibited by the sales agency contracts, which are referred to in the record herein, whereby the entire product of the cement companies is controlled by the sales agency companies; and so far reaching was the power and control of the sales agency companies over the disposition of the output of the cement companies, that even if the cement companies should themselves sell any part of their product, still the same commissions must nevertheless be paid to the sales agency companies. These con-

tracts, then, reflect the important position of Howard: they make him the connecting link between the factory and the market,—the conduit through which the manufactured product went out, and through which the accruing revenue came in.

The making of these contracts, and the assignments thereof to the Western Building Materials Company, were negotiated by Dingee and Howard; and these assignments directly contemplate the continuity of Howard as sales agent, the option to terminate arising only upon the cessation of Howard as executive officer of the sales agency company.

And moreover: it was the clear intention of the parties that this sales agency should be exclusive in character. The contracts themselves plainly indicate that: Howard declares such to have been the fact (Record, Vol. I, p. 231); and so, likewise, does Evans (Record, Vol. I, p. 132-3). Not only do the foregoing facts illustrate the commanding position of Howard, but no one understood that better than Dingee himself, who, as the sequel will show, wished, during crises and times of stress, to conciliate Howard; and Howard himself shows that Dingee was anxious to retain him as a selling agent, while Young, on pages 724-725 and 751 of Vol. III of the record, makes it evident that the establishment of a sales agency relation of this kind was valuable to Dingee, that he always admitted it, and that he was anxious to retain Howard and Howard's company as the selling agents.

D. Organization of North Western Portland Cement Company.

Incorporated, 1906, Aug. 27.

What law: California.

Place of business: San Francisco.

Occupation: Manufacture and sale of Portland cement.

Principal Officers: Dingee and Bachman.

The North Western and the Standard were independent and distinct corporations, different sets of stockholders, and without any relations whatever up to May 1908; and the transaction involved in the cause at bar was and is the solitary point of contact between these two corporations throughout their entire corporate history.

E. Relations of Howard and the Flotation of the N. W. Co.

Notwithstanding the affected aloofness of Howard as to this subject matter, it still remains true that his intimate relations to the flotation of the North Western Company, and his complete knowledge of every step in the progress of that Company, cannot be successfully minimized; and not only was he thoroughly familiar with every move that was made, even to the point of instructing Bachman that "you may go on with your incorporation as soon as I wire you tomorrow that deeds have been signed" (Letter of July

8, 1906, Record, Vol. III, p. 780), but he communicated his knowledge to Evans. The intimate relations of Howard to the flotation of the N. W. Co. obtrude themselves everywhere throughout the record. He was interested as sales agent in extending his own business: it was he who originated the move by suggesting to Dingee the establishment of a Puget Sound factory: his interest was so keen that he warned Dingee of the consequences of the establishment of such a factory by others: he was interested because his Western Fuel Company was a bondholder in the Santa Cruz Company: he wanted the sales agency for the Puget Sound factory, and Dingee had promised it to him; and his interest in the project led him into action. He was deputed by Dingee to locate lime deposits, and did so, and acquired the lands with money furnished by Dingee and Bachman (and we all know how long and how hard this uninterested gentleman fought the gas-pipe gang), and the title to these lands subsequently vested in the N. W. Co.: that upon the organization of the N. W. Co., Howard's Western Building Materials Company, in view of the anticipated sales agency, became a bondholder in the N. W. Co., and later Howard became a stockholder therein. These very convincing indicia of interest do not exhibit Howard standing apart in chill indifference to the launching of the N. W. Co.; and unless plain English speech has lost its significance, not only did the original idea of the Puget Sound factory

spring from Howard's brain, but he fostered the development of that idea in every way and through every avenue open to him.

And then, too, consider briefly the revelations of the correspondence: for one cannot do more, at this time, than make a general statement, the details being discussed later. But in general terms we know that Howard was immersed in the project from the beginning: that his activity in the northwest was marked: that he assisted with Evans in the original inspection of the Kendall properties: that he purchased them: that he located 80 acres in his own name: that he fought the ensuing litigation: that the patent was taken in his name: that he dealt with attorneys, and railroad men, and power men, and other men: that he had the Washington agent appointed: that he even bestowed the name of "Devon" upon the place: that as far back as 1906, he was familiar with the financial scheme of the Company: that he looked forward to the sales agency for the enterprise, but thought that jail was a poor place from which to manage a cement business: that he participated in the promotion of the Company as a partner with Dingee and Bachman: that he was to share "alike" (Record, Vol. II, p. 385) with them in the promotion profits: that out of his "allotment" (Id., p. 384) and "share" (Id.), he was to "take care of" Evans (Id.); and that he got his share of \$900,000 and did take care of Evans to the tune of \$200,000. We find this uninterested gentle-

man speaking of "*our* construction work"; and on July 3rd, 1906, we find him speaking of "*our* factory"; and on October 17th, 1906, we find him speaking of "*our* land." We find him dealing with attorneys: we find him dealing with railroad men: we find him dealing with power men: we find him writing to Dingee about "*our* getting the juice": we find him baptizing the northern site by the name of "Devon": we find him writing to Dingee that "the sooner *we* get a move on, the better"; and we again find him writing to Dingee at New York that "*we* should be up and doing." And indeed, it was conceded not only that Howard suggested the original idea of the N. W. Co. enterprise, and that he was interested therein, but also that his letters show that he was much interested therein.

These, and other facts and circumstances which will be discussed hereafter, illustrate Howard's continued and persistent activity and interest in the launching of the new enterprise: his letters show directly his consciousness that what he was doing was to prepare the way for the new organization: can any reasonable man say that his efforts were not intended to aid and assist the launching and floating of the N. W. Co.? How insincere, then, is the attempt to minimize his activity and interest? What importance, then, can be attached to Howard's extraordinary testimony, that he did not know who organized the North Western Portland Cement Company, or his affectation of doubt

as to its organization in 1906, or his extraordinary statements, that he did not know precisely when the N. W. Co. was organized, and that he never heard of its bond issue in particular. And Evans is even worse. He was thoroughly in touch with the whole situation: he was so notoriously in touch with it, that remote machine manufacturers addressed offers of machinery to him for "your proposed cement works," they noting "that you contemplate the construction of a cement plant at Kendall in the near future," and "that you are about to erect the largest cement plant in the United States"; and we know also that Evans was thoroughly in touch with the whole situation, not only from the correspondence itself, but also from Howard's own testimony. And yet, Evans was actually guilty of this:

"Q. Was Mr. Howard in any way interested in that transaction?

"A. In what way?"

(Note the punctilious straight-forwardness of this reply.)

"Q. In any way whatever.

"A. As a promoter?"

(Note again the engaging and limpid sincerity of the man.)

"Q. Either as a promoter, or an organizer, or

an assistant in any way, in the establishment of that corporation.

“A. I DON’T THINK SO” (Record, Vol. I, p. 128).

F. The Bond Issue of the N. W. Co.

Date of Authorization of Bond Issue: November 3rd, 1906.

Purpose: To establish and equip at Kendall a cement producing plant of the capacity of at least 5,000 barrels per day.

I stop here for a moment to call attention to an interesting passage in the testimony of Mr. Howard, bearing upon this point—a passage which is in line with the minimizing of his interest in the N. W. Co. and in which he would seek to suggest his aloofness from this matter of the bond issue. He was asked:

“Q. What was the purpose of the bond issue of the North Western Company?

“A. Well, I ASSUME that it was for the construction of the plant, but I was not a party to the arrangement or the capitalization scheme of organization; I did not have anything to do with that at all” (Record, Vol. I, p. 281-2).

Is it not interesting thus to listen to the “assumption” of the man who purchased the properties, who, as Evans says, “was representing Mr. Dingee” in the north (Record, Vol. I, p. 132), whose interest and

activity in the flotation of the Company could not very well have been exceeded, and whose familiarity with the history and progress of the enterprise was complete?

Amount: Two Millions of Dollars.

Securities: Present and after acquired property of the Company.

The Howard Bondholders: Evans and Evans' assignors, and some others, took some of these bonds through the man who originally suggested the idea of the Puget Sound plant to Dingee, who was allied with the Dingee interests, who was to participate equally with Dingee in the promotion profits, and who was looking to Dingee for the sales agency if and when the enterprise was floated.

G. Subsequent History of North Western Company.

And here again, I continue to speak in general terms, deferring for the present the discussion of details. The record shows:

1. Unlawful diversion by Dingee of proceeds of bond issue.

And this is conceded only throughout the pleadings and proofs.

2. Cessation of operations at Kendall.

3. Enterprise a failure:

No works, no mill, no factory.

No plant established.

Abandonment of construction work conceded.

No cement whatever produced.

Not one dollar of income ever produced.

No dividend ever paid.

No sinking fund ever created.

Heavy indebtedness: Open, bond and interest accounts.

More enterprising competitors already in same field in 1907.

No stockholders' meeting after November 3, 1906:

Once the bonds were authorized, stockholders' meetings became mere elegant superfluities.

Not a going concern: Howard, Record, Vol. I, p. 283; Evans, Record, Vol. I, p. 192.

4. Dissatisfaction and suspicions of the Howard bondholders.

5. Evans unanswered and ignored letters.

6. The Wenzelburger investigation.

7. Full discovery of the real situation.

8. Evans' agitation, trepidation as to his money, and threats of criminal prosecution.

9. Communication by Howard to Dingee of Evans' state of mind, and Dingee's consequent anxiety.

10. Evans' subsequent conduct:

Visit to San Francisco as soon as he could.
Conferences with Smith and Howard.

11. The interviews between Howard and Dingee, and Howard's reports.

12. Dingee's deliberate sacrifice of an independent corporation that he controlled, to placate the threatening Howard bondholders, and enable them to unload a bad and worthless investment upon that independent corporation, all done with the full knowledge, approval, consent, instigation and participation of those same Howard bondholders.

13. The subsequent repudiation of the notes by the injured corporation, and this litigation.

H. The Ultimate Problem Presented.

Aside from questions affecting consideration and delivery, this Court is called upon to determine whether there was a breach of corporate trust by Dingee; whether the Howard bondholders participated therein; whether there is or is not any protection for a corporation from participated breaches of trust; and whether it is agreeable to justice that alleged notes, the progeny of a participated corporate fraud, should be enforced.

All of these matters, we shall endeavor to present in their proper order.

There is nothing amazing about litigation of this type. Ever since corporations became active in the mercantile and financial world, such litigation has been notoriously common; and it has so grown with the flight of time, that now exhaustive tomes are given up to the discussion of corporate problems, and the time, attention and energies of the courts throughout the United States, and in the mother country, are devoted to the unraveling of corporate tangles, frauds and breaches of trust.

As far back as the days of De Foe, of immortal memory to every lover of literature, as far back as 1696, juggling and jobbery in corporate affairs was no new thing; and in his essay on "Projects," we find him saying:

"Here begins the forming of public joint-stocks which, together with the East Indian, African and Hudson Bay Companies, before established, begot a new trade, which we call by a new name, stock-jobbing, which was at first only the simple occasional transferring of interest and shares from one to another as persons alienated their estates; but by the industry of the exchange brokers, who got the business into their own hands, it became a trade, and one, perhaps, managed with the greatest intrigue, artifice and trick that ever anything that appeared with a face of honesty could be handled

with. Thus stockjobbing . . . and projecting . . . indeed are now almost grown scandalous."

And that the scandalous aspect of the matter has persisted even unto this present day, let Mr. Cook attest:

"Perhaps the most striking feature of the modern era of industrial development is the growth, wealth, and power of corporations. They have built the railways, dug the canals, established the factories, carried the ocean commerce, and assumed control of the industries of Europe as well as of America. They have absorbed a large part of the surplus wealth of the world, and have been the means of making great profits. But these gains and profits have not always been honestly preserved and administered for the benefit of those who are entitled thereto—the stockholders of the company. Corporations, with their vast capital stock and their great income, have proved to be a temptation to corporate officers. These companies have been found to be efficient instruments of fraud and illegal gain. Corporations have become insolvent, and stockholders have lost their investments, while individuals have become millionaires.

"The expense, difficulty, and delays of litigation; the power and wealth of the guilty parties; the secrecy and skill of their methods; and the fact that the results of even a successful suit belong to the corporation, and not to the stockholders who sue, all tend to discourage the stockholders, and to encourage and protect the guilty parties.

"In England, ever since the year 1720, when the 'South Sea Bubble' exploded and unsettled the finances of the kingdom, there have been many instances of 'bubble companies' and dishonest promoters.

"In America the cases involving a breach of trust by the directors arise generally out of the management of corporations, and not in their formation.

"It is the purpose of this part of this work to explain, so far as is possible, the methods of those frauds, and to point out the remedy for the wrong."

2 *Cook, Corporations*, Ed. 1908, Sec. 643.

And so it will continue as long as human nature remains unchanged; for experience has demonstrated that men in the commercial world are very human indeed, and are swayed by the ordinary motives that inspire human conduct. Sometimes, the hope has been expressed that the great power of corporations would be used wisely, and that hope has been answered by grave utterances concerning the sobering effect of power: but the history of the corporate conception makes it wholly clear that nothing could be more fallacious than to appeal to the good will or benevolence of financial captains for the protection of the stockholders or the corporation. History, and especially the history contained in the decisions of the courts in corporate cases, bears it in upon us that the hope of the stockholder or the corporation for eco-

conomic well-being cannot be put in the assumed benevolence of any class of men, whether of high standing or of low standing, or whether of assumed high standing or of assumed low standing; one's observation of human nature repudiates that procedure; and one must concur in the impassive remark of Benjamin Harrison that "the man whose protection from wrong rests wholly upon the benevolence of another man or of a Congress is a slave—a man without rights." And since the appeal to benevolence,—even the appeal to enlightened self-interest,—has been found to be unavailing, the logic of events developed the appeal to legislation:—whence the ever-increasing mass of corporation laws the country over, designed to protect the stock-holder and the corporation from breaches of trust however ingenious or cunningly devised.

It was said by Mr. Justice Potter in a Rhode Island case (*Greene vs. Harris*, 11 R. I., 5) that "Human nature constitutes a part of the evidence in every case"; and in one of those innumerable corporation cases which occupy our courts, it was said by Mr. Justice Brewer, in delivering the opinion of the Supreme Court in *Louisville Trust Co. vs. Louisville Ry.*, 174 U. S., 688, that "Human nature is something whose action can never be ignored in the courts"; and while it is this very human nature that is responsible for so much, if not all, of our corporate litigation, yet it is fortunate that it is to this very human nature that the courts may look, not only to comprehend, but also to

interpret, the evidence in a given cause,—precisely as Mr. Justice Brewer did in the cause cited. And as we shall see hereafter, the books fully support the proposition that, in drawing inferences from the evidence, the courts are not hidebound, not bound down to the very letter of the evidence, but, especially where indirect processes are involved, may receive all the light which may be shed upon the evidence by their own common sense, and by their knowledge and experience of men and of life, of human nature and human motives, of human passions and human selfishness. In other words, it is always competent for a judge, deciding matters of fact, to use his knowledge of human nature and of the customs of human society in his efforts to interpret conduct and judge of its indications.

Knowing what we know of corporate history, and of what the California Code of Civil Procedure in Section 1960 refers to as “the usual propensities of “passions of men, the particular propensities or passions of the person whose act is in question, the “course of business, or the course of nature,” we need discover nothing unprecedented in litigation of this type. So long as human nature remains the same, so long as the world-old motives continue to inspire human conduct, just so long shall we be confronted by the play of those motives and the operation of that nature in the field of corporate endeavor; and just so long will corporate litigation,—born of

the spirit of competitive enterprise, of the struggle for mastery, or of the passion for personal financial aggrandizement,—continue to occupy the courts; and that, too, in the face of all the corporation laws that the ingenuity of legislatures may frame.

No, there is nothing novel in litigation of the type here presented: the offending Adam remains with us ever, and will not be whipped out.

SPECIFICATION AND ASSIGNMENT OF ERRORS.

I.

The evidence received upon the trial of the above-entitled action is wholly insufficient to justify that of Finding II of the findings of the Referee herein on which Findings the decision herein is based, whereby it is found that on May 5, 1908, said Standard Portland Cement Corporation made, executed and delivered to the plaintiffs its promissory note dated May 1, 1908, for \$30,000.00, which said promissory note is set out at length in said Finding II; and in this behalf, this petitioner for a new trial shows that said evidence fails to disclose any right, power or authority in the Vice-President or Secretary, or both, of said Standard Portland Cement Corporation to make, execute or deliver to said plaintiffs the promissory note in said Finding II, set out; and in this behalf, this petitioner for a new trial further shows that said

evidence discloses that the attempted making, execution and delivery of the promissory note referred to in said Finding II, by said Vice-President and Secretary of said Standard Portland Cement Corporation, was a legal fraud upon, and breach of trust against said Standard Portland Cement Corporation, committed by William J. Dingee, said Vice-President, and participated in by said plaintiffs.

2.

Said evidence is wholly insufficient to justify that part of Finding II, of the Findings of the Referee herein, on which Findings the decision herein is based, whereby it is found that said plaintiffs are and always have been the owners and holders of the promissory note in said Finding II, set out; and in this behalf, this petitioner for a new trial shows that there is no evidence herein to support said finding, or any finding, that said promissory note ever had any lawful existence, or ever was a legal obligation of said Standard Portland Cement Corporation.

3.

Said evidence is wholly insufficient to justify that part of Finding III of the Findings of the Referee herein, on which Findings the decision herein is based, whereby it is found that on May 5, 1908, said Standard Portland Cement Corporation made, executed and delivered to Charles D. Rand its promissory note

dated May 1, 1908, for \$5,000.00, which said promissory note is set out at length in said Finding III, and in this behalf, this petitioner for a new trial shows that said evidence fails to disclose any right, power or authority in the Vice-President or Secretary, or both, of said Standard Portland Cement Corporation to make, execute or deliver to said Charles D. Rand the promissory note in said Finding III, set out; and in this behalf, this petitioner for a new trial further shows that said evidence discloses that the attempted making, execution and delivery of the promissory note referred to in Finding III, by said Vice-President and Secretary of said Standard Portland Cement Corporation, was a legal fraud upon, and breach of trust against said Standard Portland Cement Corporation, committed by William J. Dingee, said Vice-President, and participated in by said Charles D. Rand, and said plaintiffs, his assignees.

4.

Said evidence is wholly insufficient to justify that part of Finding III, of the Findings of the Referee herein, on which findings the decision herein is based, whereby it is found that said plaintiffs, ever since the assignment and endorsement by said Charles D. Rand, of said promissory note to them, have been the owners and holders thereof; and in this behalf, this petitioner for a new trial shows that there is no evidence herein to support said finding, or any finding, that

said promissory note ever had any lawful existence, or ever was a legal obligation of said Standard Portland Cement Corporation.

5.

Said evidence is wholly insufficient to justify that part of Finding IV of the Findings of the Referee herein, on which Findings the decision herein is based, whereby it is found that on May 5, 1908, said Standard Portland Cement Corporation made, executed and delivered to T. R. Stockett, Trustee, its promissory note dated May 1, 1908, for \$3,000.00, which said promissory note is set out at length in said Finding IV; and in this behalf, this petitioner for a new trial shows that said evidence fails to disclose any right, power or authority in the Vice-President or Secretary, or both, of said Standard Portland Cement Corporation to make, execute or deliver to said T. R. Stockett, Trustee, the promissory note in said Finding IV, set out, and in this behalf, this petitioner for a new trial further shows that said evidence discloses that the attempted making, execution and delivery of the promissory note, referred to in said Finding IV, by said Vice-President and Secretary of said Standard Portland Cement Corporation, was a legal fraud upon, and breach of trust against said Standard Portland Cement Corporation, committed by William J. Dingee, said Vice-President, and participated in by

said T. R. Stockett, Trustee, and said plaintiffs, his assignees.

6.

Said evidence is wholly insufficient to justify that part of Finding IV of the Findings of the Referee herein, on which Findings the decision herein is based, whereby it is found that said plaintiffs, ever since the assignment and endorsement by said T. R. Stockett, Trustee, of said promissory note to them, have been the owners and holders thereof; and in this behalf, this petitioner for a new trial shows that there is no evidence herein to support said finding, or any finding, that said promissory note ever had any lawful existence, or ever was a legal obligation of said Standard Portland Cement Corporation.

7.

Said evidence is wholly insufficient to justify that part of Finding V of the Findings of the Referee herein, on which Findings the decision herein is based, whereby it is found that on May 5, 1908, said Standard Portland Cement Corporation made, executed and delivered to Thomas Graham its promissory note dated May 1, 1908, for \$1,000.00, which said promissory note is set out at length in said Finding V; and in this behalf, this petitioner for a new trial shows that said evidence fails to disclose any right, power or authority, in the Vice-President or Secretary, or both, of said

Standard Portland Cement Corporation, to make, execute, or deliver to said Thomas Graham the promissory note in said Finding V set out; and in this behalf, this petitioner for a new trial further shows that said evidence discloses that the attempted making, execution and delivery of the promissory note referred to in said Finding V, by said Vice-President and Secretary of said Standard Portland Cement Corporation, committed by William J. Dingee, said Vice-President, and participated in by said Thomas Graham and said plaintiffs, his assignees.

8.

Said evidence is wholly insufficient to justify that part of Finding V of the Findings of the Referee herein, on which Findings the decision herein is based, whereby it is found that said plaintiffs, ever since the assignment and endorsement by said Thomas Graham of said promissory note to them, have been the owners and holders thereof; and in this behalf, this petitioner for a new trial shows that there is no evidence herein to support that finding, or any finding, that said promissory note ever had any lawful existence, or ever was a legal obligation of said Standard Portland Cement Corporation.

9.

Said evidence is wholly insufficient to justify Finding VI of the Findings of the Referee herein, on

which findings the decision herein is based, whereby it is found that each of the promissory notes in said Findings mentioned was made, executed and delivered for a valuable consideration paid and delivered by the respective payees of said notes to said Standard Portland Cement Corporation on May 5, 1908, that is to say: on said date, the above named plaintiffs delivered to said Standard Portland Cement Corporation 30 bonds and 300 shares of the stock of the Northwestern Portland Cement Company, a corporation, and in consideration therefor there was delivered to the plaintiffs the promissory note set forth in the above mentioned Finding numbered II, and that at the same time, Charles D. Rand delivered to said Standard Portland Cement Corporation 5 bonds and 50 shares of the stock of the Northwestern Portland Cement Company, a corporation, and in consideration therefor there was delivered to said Rand the promissory note set forth in the above mentioned Findings numbered III, and that at the same time, T. R. Stockett, Trustee, delivered to said Standard Portland Cement Corporation 3 bonds and 30 shares of the stock of the Northwestern Portland Cement Company, a corporation, and in consideration thereof there was delivered to said T. R. Stockett, Trustee, the promissory note set forth in the above mentioned Finding numbered IV, and that at the same time Thomas Graham delivered to said Standard Portland Cement Corporation 1 bond and 10 shares of the stock of the Northwestern Port-

land Cement Company, a corporation, and in consideration therefor there was delivered to said Thomas Graham the promissory note set forth in the above mentioned Finding numbered V; and in this behalf, this petitioner for a new trial shows that said evidence fails to show that any of said bonds or shares of said stock of said Northwestern Portland Cement Company, said corporation, hereinabove and in said Finding numbered VI referred to, were ever delivered to said Standard Portland Cement Corporation, or come into its possession, or under its control, or passed into its treasury; and in this behalf, this petition for a new trial further shows that said evidence discloses that said bonds and said shares of stock were delivered to and received by and passes into the treasury of said Northwestern Portland Cement Company; and in this behalf this petitioner for a new trial further shows that said evidence fails to show that any of the above mentioned promissory notes were made, executed or delivered for a valuable or any consideration, paid and delivered, or paid or delivered, by the respective or any payees or payee of said notes, or of any of them, to said Standard Portland Cement Corporation on May 5, 1908, or at any other time, or at all.

10.

Said evidence is wholly insufficient to justify the Findings of the Referee herein, on which Findings the decision herein is based, and more particularly

Finding numbered VII, wherein and whereby said Referee hath omitted to find upon every issue presented by the answer of said Standard Portland Cement Corporation in the above entitled action, and hath found that the same issues were presented in the equity suit numbered 15249 in said Finding VII referred to, and that said issues were in said equity cause determined adversely to said Standard Portland Cement Corporation; and in this behalf, this petitioner for a new trial herein shows that there was evidence before said Referee upon which the other issues referred to in said Finding VII should have been determined in the above entitled action, whether involved in the aforesaid equity suit or not, that the adverse determination of said other issues in said equity suit was not warranted, justified or sustained by the evidence in said equity suit, but was contrary to the evidence, and to the weight and effect of the evidence therein, and that said Referee should have found said issues in said equity suit numbered 15249, favorably to said Standard Portland Cement Corporation.

II.

Said evidence is wholly insufficient to justify the Findings of the Referee herein, on which Findings the decision herein is based, and more particularly the Finding of said Referee that said plaintiffs are entitled to judgment against said defendants, and each

of them, for the sum of \$39,000.00, together with interest at the rate of six per cent. (6%) per annum, from the first day of May, 1908, compounded semi-annually, and for costs; and in this behalf, this petitioner for a new trial herein shows that said evidence discloses a valid defense on the part of said Standard Portland Cement Corporation in the above entitled action, and that upon the pleadings, evidence and record in said action said Standard Portland Cement Corporation was entitled to findings and judgment in its favor and against said plaintiffs.

12.

The decision given and made in the above entitled cause is contrary and against law because of errors of law occurring during the trial and excepted to by said Standard Portland Cement Corporation; and in this behalf, this petitioner for a new trial hereby makes express reference to the detailed specifications herein included in the Assignment of Errors under the aforesaid Ground Number 3, and makes them and each of them part and parcel of this specification.

13.

Said decision is contrary to and against law because of the insufficiency of the evidence to justify said decision; and said petitioner for a new trial hereby makes express reference to the detailed specifications herein included in the Assignment of Errors under

the aforesaid Ground number 1, and makes them and each of them part and parcel of this specification.

14.

Said decision is contrary to and against law, because said Findings failed to find, but should have found, that the financial crisis for the year 1907 began in the spring of that year, and that during the years 1907 and 1908 William J. Dingee was without funds wherewith to carry on any enterprise and was insolvent, and that said plaintiffs and their assignors received the par value of the bonds improperly found to have been purchased by said Standard Portland Cement Corporation, together with accrued interest thereon, up to the date of the promissory notes in the above mentioned Findings referred to.

15.

Said decision is contrary to and against law, because in and by said Findings, it is found that said Standard Portland Cement Corporation has no valid defense against or in the above entitled action, and is not entitled to any relief against the above named plaintiffs, and that the above named plaintiffs are entitled to judgment against said defendants in the manner and form stated in said Referee's Conclusions of Law in the above entitled action; whereas said Referee hath failed to find, but should have found, that said defendants, and in particular said Standard Portland

Cement Corporation, have a valid defense in and to the above entitled action, and are entitled to the relief prayed for in the answer therein and that the above named plaintiffs should take nothing by their action herein, and that said defendants and each of them should have judgment herein for costs.

16.

Said decision is contrary to and against law, because it failed to grant the relief prayed for by said Standard Portland Cement Corporation, and was given, made and rendered in favor of the above named plaintiffs and against the above named defendants, and because said decision was and is contrary to the evidence and to the weight and effect of the evidence, and to the case made and stated in the pleadings, evidence and record in the above entitled action.

17.

Said decision is contrary to and against law, because upon the evidence received upon the hearing of said cause said Master and Referee erred in making his report and findings of fact and conclusions of law in favor of said plaintiff and against said defendants, and should have made his report and findings of fact and conclusions of law in favor of said defendants and against said plaintiffs.

18.

Said decision is contrary to and against law, because said Court erred in making and giving its order overruling the exceptions of said defendants, the Standard Portland Cement Corporation to said report and findings of fact and conclusions of law of said Master and Referee; and erred in confirming said report and findings of fact and conclusions of law; and erred in directing judgment for said plaintiffs and against said defendants in accordance with said report; and said Court erred in failing to sustain said objections of said defendant, Standard Portland Cement Corporation to said report, together with said findings of Fact and conclusions of law, and erred in failing to direct judgment in favor of said defendants and against said plaintiffs.

19.

Said decision was contrary to and against law, because said Court erred in making, giving, rendering and entering judgment herein, in favor of said plaintiffs and against said defendants: and erred in failing to give, make, render and enter therein its judgment in favor of said defendants and against the said plaintiffs.

20.

The Referee in the above entitled action erred in overruling the objection of said Standard Portland

Cement Corporation, to the following question asked the witness Ernest E. Evans on cross-examination in his deposition now on file in the above entitled action:

“Mr. Evans, at the time of the sale of the bonds and stocks of the Northwestern Portland Cement Co. to the Standard Portland Cement Corporation, had you considered in your own mind the value of the assets of the Northwestern Portland Cement Company?”

Said objection was made upon the ground that said question and the evidence sought to be elicited thereby were incompetent, immaterial and irrelevant, and not pertinent to any issue in the case and assuming a fact as to which there was no evidence, to wit: that there was any sale to the Standard Portland Cement Corporation, and calling for the secret, uncommunicated mental processes of the witness: said objection was overruled by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

21.

Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation to strike out all of the testimony given by the witness Ernest E. Evans in his deposition now on file in the above entitled action, relative to the values, and particularly to the value of any estate of assets of the

Northwestern Portland Cement Company; said motion was made upon the ground that said testimony of said witness was incompetent, immaterial and irrelevant, without foundation,—it not appearing that the witness knew either the intrinsic value of the alleged assets or the market value thereof, and upon the ground that the answer as given was not responsive to the question asked. Said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

22.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness Ernest E. Evans on cross-examination in his deposition now on file in the above entitled action:

“What figure, if any, did you put upon those assets?”

Said objection was made upon the ground that said question and the evidence sought to be elicited thereby were incompetent, immaterial and irrelevant, and not pertinent to any issue in the case and assuming a fact as to which there was no evidence, to wit: that there was any sale to the Standard Portland Cement Corporation, and calling for the secret, uncommunicated mental processes of the witness, and upon the further

ground that his mental condition, or mental processes, beliefs or private opinions, uncommunicated, are immaterial to any issue in this case, and do not constitute any fact or facts by which said Standard Portland Cement Corporation could or should be bound; said objection was overruled by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

23.

Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation to strike out the following answer given by the witness Ernest E. Evans on his cross-examination in his deposition now on file in the above entitled action:

“Well I considered that they were worth between \$240,000 and \$250,000, that is, if the Company were liquidated.”

Said motion was made upon all the grounds stated in the objection mentioned in the last preceding paragraph herein, and upon the further ground that said answer was purely speculative; said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation to strike out, the following answer given by the witness Ernest E. Evans on cross-examination in his deposition now on file in the above entitled action, in response to the question:

“By ‘liquidated’ you mean?,” namely, “That is to say, if the Company went into liquidation, and the assets were sold, they would realize between \$240,000 and \$250,000, but as a going concern I considered that was worth par easily, because the money which was actually spent in construction would have had to be spent anyhow.”

Said motion was made upon all the grounds enumerated in paragraph 22 hereof, and upon the further ground that said answer is not responsive to the question asked, and upon the further ground that the witness was merely speculating as to possibilities, and not stating a fact, but making an argument: said motion was denied by said Referee, to which ruling the said Standard Portland Cement Corporation duly excepted and now assigns the same as error.

Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation to strike out the following passage from the tes-

timony given by the witness, Ernest E. Evans on cross-examination in his deposition now on file in the above entitled action:

“Q. Considering the concern as a going concern, or as a concern the owners of which contemplated going ahead with it, would you have out a different figures upon the assets?

“A. Certainly, the going ahead with it; I would consider it fully worth par.”

Said motion was made upon all the grounds heretofore stated in paragraph 22 hereof and in the last preceding paragraph hereof; said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation duly excepted and now assigns the same as error.

26.

Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation, to strike out the following passages from the testimony given by the witness Ernest E. Evans on cross-examination in his deposition now on file in the above entitled action:

“Q. At the time referred to of the sale of your stocks and bonds to the Standard Portland Cement Corporation, did you have any information as to the plans of Mr. Dingee or Mr. Bachman for going ahead, or not going ahead with the Northwestern Cement Company?

"A. Yes; I distinctly understood all along that they were going ahead with this, only they had stopped it owing to the financial panic until things settled down again, and at the time that I met Dr. Bachman when he went to examine the property, of course, we spent the evening together, and he distinctly stated this Northwestern Portland Cement Company was to be eventually amalgamated with the Santa Cruz and the Standard Portland Cement Corporation."

Said motion was made upon all the grounds heretofore enumerated in the previous paragraphs herein, and upon the further grounds that the above mentioned answer was incompetent, immaterial and irrelevant, not responsive, involving hearsay, *ex parte* declarations of persons by whose statements the above named Standard Portland Cement Corporation would not be bound or should not be bound, and not proper cross-examination: Said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

27.

Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation to strike out, the following passage from the testimony given by the witness Ernest E. Evans on cross-examination in his deposition now on file in the above entitled action:

“What interest, if any, did you understand the Standard Portland Cement Company had in the Northwestern Cement Company?”

“A. Well, the idea of starting the Northwestern Company was strategic, and with the idea of protecting the other factories.”

Said motion was made upon all the grounds heretofore stated in the last preceding paragraph hereof: Said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

28.

Said Referee erred in receiving, and denying the motion of said Standard Portland Cement Corporation to strike out, a portion of the following passage from the testimony given by the witness John L. Howard on cross-examination upon the hearing in the above entitled action:

“Q. At the time of the purchase of the bonds of the Northwestern Portland Cement Company by the Standard Portland Cement Corporation was anything said by Mr. Dingee as to the plans of the Standard Portland Cement Corporation relative to the Northwestern?”

“A. I don’t recall that he said anything at that time, but both he and Bachman had frequently spoken of it before.”

Said motion was made upon the ground that the latter

half of the foregoing answer was not responsive to the question asked: said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

29.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness John L. Howard on cross-examination upon the hearing of the above entitled action:

“Q. I call your attention to Defendants’ ‘Exhibit 2’ and to the letter therein by the Standard Portland Cement Corporation to the Western Fuel Company dated March 8, 1906, and to the assignment therein dated June 30, 1906, by the Western Fuel Company to the Western Building Material Company of the sales contract between the Western Fuel Company and the Standard Portland Cement Company, and to the consent therein of such assignment by the Standard Portland Cement Company, and ask you what is the explanation of the provision in the letter and assignment to the effect that the sales contract may at any time be terminated at the option of the Standard Portland Cement Company in case you yourself should cease at any time to be the general executive officer of the Western Fuel Company or the Western Building Material Company?”

Said objection was made upon the ground that said question and the testimony sought to be elicited thereby were immaterial, irrelevant and incompetent, not proper cross-examination, without foundation in this, that it does not appear that the witness knows, and an attempt to vary the terms of a written instrument of parole evidence: said objection was overruled by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

30.

Said Referee erred in sustaining the objection of the above named plaintiffs to the following question asked the witness John L. Howard upon the hearing of the above entitled matter:

“Q. Now, it appeared then at that time that you were in doubt whether you learned of that at the time of the Wenzelburger report or whether you learned of it later?”

Said objection was made upon the ground that said question assumes something that is not in the case: said objection was sustained by said Referee, to which ruling said Standard Cement Corporation then and there duly excepted and now assigns the same as error.

31.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the

following question asked the witness Foster Young upon the hearing in the above entitled action:

“Q. But you understood, anyhow, did you not, that he came there in accordance with the letter of May 4, 1908?”

Said objection was made upon the ground that said question and the testimony sought to be elicited thereby were incompetent and not proper cross-examination, and upon the further ground that the understanding of the witness is not evidence: said objection was overruled by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

32.

Said Referee erred in granting the motion of the above named plaintiffs to strike out from the record in the above entitled action the minute book of the Northwestern Portland Cement Corporation, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

33.

Said Referee erred in sustaining the objection of the above named plaintiffs to the introduction in evidence upon the hearing of the above entitled action of the book containing the bond account and record of

subscriptions and sales of the bonds of the Northwestern Portland Cement Company: said objection was made upon the ground that said book was incompetent, immaterial, hearsay, and not the best evidence: said objection was sustained by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

34.

Said Referee erred in sustaining the objection of the above named plaintiffs to the receiving in evidence upon the hearing of the above entitled action of the memorandum slip in the handwriting of William J. Dingee showing subscription for bonds of the Northwestern Portland Cement Company: said objection was made upon the ground that said memorandum slip was incompetent, hearsay and not binding upon any of the parties to this action, and not within the knowledge of the witness: said objection was sustained by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

35.

Said Referee erred in sustaining the objection of the above named plaintiffs to the following question asked the witness Foster Young during the hearing of the above entitled action:

“Q. Has there ever been any question in your mind as to whether you held those bonds to the order of the Standard Portland Cement Corporation?”

Said objection was made upon the ground that said question was incompetent and immaterial and calling for the opinion and view of the witness: said objection was sustained by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

36.

Said Referee erred in sustaining the objection of the above named plaintiffs to the following question asked the witness Foster Young during the hearing of the above entitled action:

“Q. Have you ever regarded the Standard Portland Cement Corporation as in any manner the owner of those bonds?”

Said objection was made upon the ground that said question was incompetent and immaterial and calling for the opinion and view of the witness: said objection was sustained by said Referee to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

37.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the

following question asked the witness John L. Howard upon the hearing of the above entitled action:

“Mr. Howard will you state to the Court what evidence of lime there were in this ground in Washington which was finally acquired by the Northwestern Portland Cement Company?”

Said objection was made upon the ground that said question and the testimony sought to be elicited thereby were immaterial, irrelevant and incompetent, and without foundation in this that it was not shown that the witness is competent, and upon the further ground that it was not a proper subject matter in any event for statement by the witness—he not having been shown to have been experienced in the line to which the inquiry was addressed, and upon the further ground that the witness was a general merchant and neither a geologist nor an expert upon these matters, and upon the further ground that it already appeared that the witness had not been actually on the spot: said objection was overruled by said Referee, to which ruling the said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

38.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the

following question asked the witness John L. Howard at the hearing in the above entitled action:

“Q. What was its extent?”

Said objection was made upon the ground that no foundation had been laid, in this, that it did not appear that the witness knew: said objection was overruled by said Referee, to which ruling the said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error: and in this behalf this defendant, Standard Portland Cement Corporation, further assigns as error the ruling of said Referee admitting general statements by said witness John L. Howard as to the extent and size of the above mentioned lime deposits.

39.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness John L. Howard during the hearing of the above entitled action:

“Q. Did this acceptance or any other acceptance by the Western Fuel Company in favor of either the Standard Cement Corporation or the Santa Cruz Portland Cement Company have anything to do or play any part in connection with the sale of the bonds of the Northwestern Portland Cement Company involved in this transaction?”

Said objection was made upon the ground that said question and the testimony sought to be elicited thereby were immaterial, irrelevant, and incompetent, and calling for the opinion and private judgment of the witness, and upon the further ground that the witness had already testified that he had no recollection as to anything else affecting these acceptances except what appeared on the paper itself: Said objection was overruled by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

40.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness John L. Howard during the hearing of the above entitled action:

“Q. What knowledge or information did you have as to any intention on the part of Mr. Dingee that the bonds and stock of the Northwestern Portland Cement Company purchased by the Standard Portland Cement Corporation were not to be held by the latter company, but were to be turned over to the Northwestern Company?”

Said objection was made upon the ground that the question asked and the testimony sought to be elicited thereby were incompetent, being an effort to establish the intention of one person by the statements of another person: said objection was overruled by said

Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

41.

Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation to strike out the following passage from the testimony given by the witness John L. Howard during the hearing of the above entitled action:

“Q. What knowledge or information did you have as to the actual disposition of the bonds and stock of the Northwestern that was sold to the Standard Portland Cement Corporation?

“A. The only knowledge that I had was the fact of their delivery by Mr. Norcross to Mr. Young. Beyond that nothing.”

Said motion to strike out was made upon the ground that the question asked and the answer calls for and states the conclusion of the witness, on the further ground that it does not appear that the witness had any real or personal knowledge upon the subject, and upon the further ground that he testified from hearsay only: Said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness Sidney V. Smith upon his direct examination during the hearing of the above entitled action:

“Q. What took place at that interview as you remember it?”

Said objection was made upon the ground that the question and the testimony sought to be elicited thereby were immaterial, irrelevant and incompetent, and calling for hearsay and upon the further ground that it did not appear that the party or parties sought to be charged with what took place at that interview, or any representative of them was present thereat, and upon the further ground that as against the Northwestern Portland Cement Company, and particularly as against the Standard Portland Cement Corporation the preferred evidence was *res inter alios acta*, and self-serving: said objection was overruled by said Referee, to which ruling the said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the

following question asked the witness Ernest E. Evans during the hearing of the above entitled action:

“Q. Mr. Evans state whether or not at the first interview which you and Mr. Spencer and Mr. Smith had with Mr. Howard in March, 1908, any proposal or suggestion was made to you and the other gentlemen with you, by Mr. Howard, as to any plan for relieving you of your investments in the Northwestern Portland Cement Company?”

Said objection was made upon the ground that said question was leading and suggestive: Said objection was overruled by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

44.

Said Referee erred in finding that said Standard Portland Cement Corporation has no valid defense against or in the above entitled action, and is not entitled to any relief against the above named plaintiffs, and that the above named plaintiffs are entitled to a judgment against said defendants in the manner and form stated in said Referee's Conclusions of Law in the above-entitled action: to which said findings by said Referee, said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

Said Referee erred in failing to find, but should have found that said Standard Portland Cement Corporation has a valid defense in and to the above entitled action, and is entitled to the relief prayed for in his answer therein; and failed to find, but should have found, that the above named plaintiffs should take nothing by their action herein, and that said Standard Portland Cement Corporation should have judgment herein for its costs: which said action by said Referee, this petitioner for a new trial now assigns as error.

Said Referee erred in not granting the relief prayed for by this petitioner, and in giving, making and rendering his report and findings in favor of the above named plaintiffs and against this petitioner for a new trial: and erred in not giving, making and rendering his report and findings in the above entitled cause in favor of this petitioner, and against the above named plaintiffs: and erred in giving, making and rendering his report and findings in the above entitled cause in favor of said plaintiffs and against said defendants upon the pleadings, evidence and record in the above entitled action: all of which said action by said Referee, this petitioner for a new trial now assigns as error.

47.

Said Referee erred in giving, making and rendering his report and findings in the above entitled cause in favor of said plaintiffs and against said defendants, in this, that said report and findings, and each and all of them, were and was and are and is contrary to law, not warranted, justified or sustained by the evidence, and contrary to the evidence and to the weight and effect of the evidence and to the case made and stated in the pleadings, evidence and record in the above entitled cause: all of which this petitioner for a new trial now assigns as error.

48.

Said District (Circuit) Court erred in overruling the objections and exceptions of said Standard Portland Cement Corporation to said report and findings of said Referee, in confirming said report and findings of said Referee, and in ordering judgment in the above entitled action in conformity with said report and findings: to all of which said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

49.

Said District (Circuit) Court erred in giving, making, rendering and entering its judgment in the above entitled action in favor of said plaintiffs and

against said defendants, in conformity with said report and findings of said Referee: to all of which said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

ARGUMENT.

I.

THE STANDARD PORTLAND CEMENT CORPORATION IS UNDER NO LIABILITY TO RESPOND TO THESE NOTES, FOR THE REASON THAT NO CONSIDERATION FOR THE NOTES EVER PASSED TO THE CORPORATION.

The claim is made by these Howard bondholders that these bonds and stocks were sold and delivered to the Standard Corporation for the notes in question; and the reply of the Standard to that claim, is, among other things, that there was no consideration for the notes, that no benefit accrued to it from the alleged transaction, and that no bonds or stocks of the North Western Company were ever delivered to it.

Of course, the necessity for consideration is so obvious that its absence or its inadequacy would be an earmark of indirection:

7 Cyc., 690; 20 *Id.*, 1413.

But the claim of the Howard bondholders is that the Standard Corporation purchased the bonds and

stocks of the North Western Company at par: taking over,

39 bonds out of 284 sold; or $1/7$ of the outstanding bonds;

390 shares out of 50,000; or about $1/129$ th of the capital stock.

Bonds. But what is a corporate bond? Is it anything more than a fractional promissory note? Is it anything more, after all, than an agreement to repay a loan upon the terms stated? It does not of itself create any charge or lien upon the property of the company issuing it, or give the holder any priority over any other creditor; but it is usually secured by a mortgage or deed of trust which creates a charge and gives to the holders of the bonds secured a priority over those who may subsequently become creditors of the company.

Jones, Corporate Bonds & Mortgages, Sec. 170;
Zimmerman vs. Zimmerman, 86 N. E. (N. Y.),
 540.

Shares. And what specific right is conferred by shares?

“The right which a shareholder in a corporation has, by reason of his ownership of shares, is a right to participate *according to the amount of his stock* in the *surplus profits* of the corporation on a division, and ultimately on its dissolution in *the assets remaining after payment of its debts.*”

Richter vs. Henningsan, 110 Cal., 530, 534.

It is thus plain that neither a bondholder nor a shareholder is in any sense the owner of the property of the corporation as such: his claim is a mere incorporeality: it is stripped of immediate tangibility: it looks to the future and its hidden vicissitudes: in the one case, it is a promise; and in the other, a right to participate, if there be surplus profits or distributable assets.

Are not, therefore, both bondholder and shareholder dependent upon the assets and success of the corporation? If those assets be mere paper assets, if the enterprise be a failure, what honest value can be attached to the promises of the bonds or the hopes of the shares? Is it not plain that we are at once confronted with an inquiry into the assets and success of the North Western Company?

The assets of the North Western Company. What are the views of Mr. Evans?

Record, Vol. 1, p. 193: 217-220.

But will these declarations of this interested witness bear investigation? Naturally, he is anxious to swell these assets if he can: naturally, he wishes to put the best face possible upon this transaction: he would not be the very human individual that he is, if he did not: but fortunately the credulity of courts does not keep pace with the vigor or positiveness of any witness's testimony.

Blankman vs. Vallejo, 15 Cal., 639, 645;
Elwood vs. W. U. Tel. Co., 45 N. Y., 549, 554;
Bank vs. Diefendorf, 123 N. Y., 191, 200;
Sonnenthal vs. Moerlein Brewing Co., 172 U.
 S., 401, 408.

I. THE LAND.

Evans' Visits.

According to his Deposition, Evans made but one visit to the land, so far as our reading exhibits, and that visit was in 1906 (Record, Vol. I, p. 197). But when Mr. Evans was a witness upon the Federal hearing, the number of his visits became enlarged to three. It does not appear, however, from his testimony as given upon the hearing here, as we read it, when his last visit was made; and the only light we are able to get upon that topic, comes from his statements in his deposition that he has never visited Kendall since 1906 (Record, Vol. I, p. 136). Taking together, then, all of his testimony, both upon deposition and upon the hearing here, and recollecting Howard's testimony that the visit to Kendall was made in June, 1906, recollecting that Evans testified upon his deposition at the place cited that he has never visited Kendall since 1906, and recollecting that the N. W. Co. was not incorporated until August 27th, 1906, we respectfully insist that the only fair conclusion to be drawn from this condition of the Record is that Evans

has never set foot upon the premises since the organization or incorporation of the N. W. Co.

Character of Examination.

This is not disclosed. We are not advised, in the remotest degree, as to the care or attention with which any examination whatever was made, where Evans went, what he did, how he did it, or what precautions if any to insure accuracy he observed. As to the character of examination of the premises made by him during that brief visit in 1906, Mr. Evans maintains a most discreet silence.

Results of Examination.

These reflect back some light upon the carefulness and accuracy of Evans' examination of the premises, and the consequent reliability of his views.

HIS TESTIMONY:

Total Area: Between 640 and 1000 acres: Record, Vol. I, p. 226.

Area of Lime Deposits: 320 acres: Record, Vol. I, p. 226.

Agricultural Value:

(a) "I have not the least idea": Record, Vol. I, p. 227.

(b) The flat land, between \$15,000 and \$20,000: Record, Vol. I, p. 227.

Height of First Lime Exposure: 250 to 300 feet: Record, Vol. I, p. 227.

Land "all cleared": Record, Vol. I, p. 136.

But

The total area was not between 640 and 1000 acres;
 The area of lime deposits was not 320 acres;
 The agricultural value of the land was not between
 \$15,000 and \$20,000;
 The height of the first lime exposure was not be-
 tween 250 and 300 feet;
 Land not "all cleared."

With these exceptions, Mr. Evans' testimony may be commended as convincingly reliable.

THE REAL FACTS:

Total Area: 520 acres: Davis, Record, Vol. II, p. 580.

Area of Lime Deposits: Not quite 80 acres, probably 60: Davis, Record, Vol. II, p. 583.

And the four claims referred to were 20 acres each: Davis, Record, Vol. II, p. 580.

Agricultural Value: Worthless: Davis, Record, Vol. II, p. 581.

Except about 60 acres: Davis, Record, Vol. II, p. 582.

And the following significant corroborative circumstances should be considered:

And Zender sold his farm for \$6000:
 Howard, Record, Vol. II, p. 350.

And he bought his hay in Bellingham.

And the farmers were not madly infatuated with the agricultural capabilities of the district: Davis, Record, Vol. II, p. 583.

Height of First Lime Exposure: 600 feet: Record, Vol. II, p. 596.

60 acres cleared: 40 grubbed.

And these specific details by this civil engineer stand wholly uncontradicted.

What value, then, can we attach to Evans' effort to swell the value of this land? His argument is that the bonds and stocks had a real value of from \$240,000 to \$250,000 behind them; and he names this land as one of the principal items making up his valuation; and yet,

His lowest general area is 120 acres too great;
 His highest general area is 480 acres too great;
 His lime deposit area is between 4 and 5 times too great;
 His agricultural valuation is in shrieking discord with the facts; and
 His statement as to the height of the first lime deposit is not one-half of what it should have been.
 He is utterly wrong as to the clearing of the land.

Can any reliance be put upon such testimony as this? This testimony was the merest conjecture and useless for any legal purpose:

Reed vs. Drais, 67 Cal., 492-3;

N. Y. Mg. Co. vs. Fraser, 130 U. S., 611.

And it must also be borne in mind that the infirmities of this testimony infect Evans' general estimate as given on cross-examination at his deposition.

2. THE PLANT AT KENDALL.

This never existed, and does not exist now.

3. THE B. B. & B. C. RY. STOCK.

Evans' testimony upon this subject is very halting and imperfect.

He does not appear to know how many shares there were.

He does not appear to know that Dingee, the faithless trustee, had, entirely without any authority whatever, pledged them to secure the debt of another company.

He nowhere attempts to place any value upon these shares (Record, Vol. I, p. 193, 209).

4. "THE SANTA CRUZ PORTLAND CEMENT COMPANY OWED THEM A CONSIDERABLE AMOUNT OF MONEY, WHICH I CONSIDERED GOOD."

Record, Vol. I, p. 193.

In approaching the consideration of this statement by Evans, it is proper to point out that this declaration is not a declaration made *ante litem motam*. The declaration was made in the course of Evans' deposition, made after this suit was commenced, and when Evans was a litigant. One need not do more than refer to the leading case upon the subject, namely, the *Berkeley Peerage Case*, 4 Campbell, 401, wherein the inherent weakness of declarations made *post litem motam* is considered. The inherent weakness of this

testimony requires that it should be received with considerable caution, and it has been deemed a proper restriction that declarations of this character should not be received at all, if there is any reason to believe that a controversy has been commenced, the existence of which might prejudice the declarant or offer him temptations to deceive; and in such cases, the courts will not enter into any inquiry as to the probable effect of such controversy—it is enough that such controversy existed. In a word, when Evans made this declaration, he had on his war paint, and was testifying with a purpose, and for a purpose as a biased litigant.

It is next to be observed that, in addition to the foregoing discount, the testimony does not recommend itself. Evans is here speaking of March, 1908, which was the very time when:

A. He had lost confidence in Dingee to the extent that he refused to accept Dingee's assurance that he would go on with the Kendall scheme (Record, Vol. I, p. 191-2).

B. When he knew from Wenzelburger's report that Dingee was an embezzler and faithless trustee.

C. When he knew that the same man whom he had lost confidence in, whose assurance he refused to accept, and whom he knew to be a faithless trustee, was the very man who was in control of the Santa Cruz Co.;

D. When he knew from Howard, who was familiar with the Santa Cruz affairs as its sales agent and bond floater, that the Santa Cruz Co. was burdened by a heavy bonded debt, discounted by its bad product, and not an assured success—"far from it" (Howard, Record, Vol. I, p. 291) ;

E. When he knew that the Santa Cruz Co. had not paid its debt to the N. W. Co., although controlled by Dingee ;

F. When he knew from Wenzelburger's report that it was to this very Santa Cruz Co. that Dingee had unlawfully diverted part of the N. W. Co.'s funds ;

G. When he knew that Dingee, master of the Santa Cruz Co., was a financial wreck ;

Evans, Record, Vol. I, p. 189-190 ;

Howard, Record, Vol. II, p. 529-30, 540, 543-4.

H. When he knew that the Santa Cruz Co. was not responsible, and showed it by rejecting that Company's note when offered by Dingee,—an opinion that was shared by Howard, who advised taking the note of the Standard. When put to the test, Evans' acts spoke louder than his present biased words.

How can Evans treat any obligation of the Santa Cruz Co. to the N. W. Co. as adding anything to the latter Company's assets? How could he honestly

“consider good” any debt of the Santa Cruz Co., then tottering upon the verge of the same dismal fate that overtook the N. W. Co.?

5. MACHINERY.

This “machinery,” which was afterwards shipped to Santa Cruz by Dingee’s orders, was, in Evans’ contemplation, limited to a couple of donkey engines.

Evans, Record, Vol. I, p. 193.

6. STOCK OF N. W. CO.

No attempt is made to put any value upon it, whether market or otherwise; indeed, it nowhere appears that it had any market value.

7. BONDS OF N. W. CO.

No attempt was made to put any value upon them. On the contrary, it appeared that they had never been listed upon any bond or stock exchange.

CONCLUSION AS TO EVANS:

His testimony can scarcely be said to supply gilt edge to the artistically engraved pieces of paper that, as the result of conferences between the Howard bondholders and Dingee, Dingee’s directors caused the Standard’s notes to be issued for.

As an appraiser of land values, he was grotesquely incompetent: so far as the placing of any plant is con-

cerned, he furnishes a useful definition of the word "nothing": he does not even attempt any valuation of the B. B. & B. C. Ry. stock, or of the N. W. Co. bonds or stock, or of the machinery,—to wit: the brace of donkey engines: his attitude as to the debt from the Santa Cruz Co. to the N. W. Co. is transparently insincere; and if his version exhibits anything, it shows an abandoned hole in the ground not even big enough to contain the burden of debt attached to it.

No one knew better than Evans that the security was not good for the loan: no one knew better than he that the "alleged" investment, to use Evans' own language, at Kendall was worthless; and his own acts and conduct demonstrate it, independently of Howard's declaration to him that there was not the investment at Kendall to represent the amount that Howard thought Dingee had received.

Howard, Record, Vol. II, p. 535.

And Evans' willingness to surrender the secured N. W. Co. bonds and stocks for the unsecured one-year note of the Standard, reflects with illuminating vividness his own opinion of the remarkable value of the N. W. Co. bonds and stocks. The very anxiety with which he was consumed, to get rid of these bonds and stocks, and the promptness of his concert with Dingee in the plan to unload them upon the disconnected corporation then to his knowledge in the hollow of Dingee's hand, are facts eloquent with discount of what,

with undoubted sarcasm, Evans would describe as N. W. "securities." It is, of course, his role to swell the assets of the N. W. Co. if he can: but why should he do this, if not from his consciousness that some front must be presented to cover the deplorable ineptitude of these so-called securities? Evans' motives in this are obvious: but he can not prevent those motives from laying bare his real opinions. Mr. Justice Brewer tells us:

"Human nature is something whose action can never be ignored in the courts, and parties who have acquired full and absolute title to property are not as a rule donating any interest therein to strangers."

Louisville Trust Co. vs. Louisville, etc., Ry.,
174 U. S., 674, 688.

Evans tells us that he wanted to get rid of these bonds—these magnificent bonds, this splendid investment: he wanted to get rid of them:

Record, Vol. I, p. 191-2: 192-3.

But a mere bowing acquaintance with human nature would advise us that parties who have acquired full and absolute title to bonds with a quarter of a million of assets behind them even in liquidation, but worth par as a going concern (Evans, Record, Vol. I, p, 217-220), do not enter into arrangements with an insolvent president controlling a corporation it-

self financially fragile, whereby such bonds are surrendered for the unsecured note of that financially fragile corporation, without exhibiting the hollowness of their pretensions as to the value of such bonds.

And how delightfully refreshing is the sincerity of the gentleman who tells us at page 219 of Vol. I that the assets of the N. W. Co., "*as a going concern*" were "worth par easily"; and who tells us that when, in February, 1908, he received the Wenzelburger report, he then knew that the N. W. Co. was not a going concern (Vol. I, p. 192); and yet, on March 25-26, 1908, agrees with Dingee, through his agent Howard, to take the note of the Standard for these wretched bonds at par; and actually, in May, 1908, receives that note at par; and is now seeking to enforce it against the betrayed corporation.

And What Are the Views of Mr. Howard upon this Subject Matter?

It is true that while a witness he attempted no valuation: but, nevertheless, his point of view is sufficiently exposed: Record, Vol. II, p. 362-3.

The Bonds. "The property and plant will represent the bonds" (Letter, Howard to Evans, May 20, 1906: Record, Vol. II, p. 362).

But the bond issue was Two Million Dollars.

And the outstanding bonds, according to the allegations of the Answer, aggregated \$284,000. The "prop-

erty," however, did not cost over \$17,800. How then could the property represent the bonds? Unless one is prepared to take violent leave of his common sense, it cannot properly be claimed that the property represented the bonds. Nor did the plant: for there was no plant to represent anything.

The Stock. Mr. Howard declares: "The promoters' shares cannot be made valuable without giving equal value to the bonus stock, and this value will depend upon the earning power of the concern, and that is largely dependent upon the management."

Record, Vol. II, p. 362-3.

But, where was "the concern"? No inquiry could well be more pertinent: where was the concern? But when we ask where was the concern, the words of Cicero that we used to read at school come back to us: We ask where was the concern, and "*Saxa et solitudines voci respondent*": we ask where was the concern, but only rocks and solitudes respond to the voice. Even Evans tells us that the North Western Company to his knowledge, was not a going concern: indeed, it was not a concern at all: it was merely an addition to the already long list of corporate failures. And what earning power had this mythical concern? What did it ever earn so as to give any value to the stock? What has it ever produced except the sacrifice of the Standard Corporation to Evans' demands and Dingee's private necessities?

B. B. & B. C. Ry. Howard's general views concerning this Railway are contained in the Record and in his correspondence. Howard, it will be remembered, was in close and confidential touch with Dingee as to B. B. & B. C. Ry. affairs, and went into the road on Dingee's stock, and even helped Dingee to acquire control, advancing money to help him to pay Nineteen Thousand Dollars (\$19,000.00) that he was short when negotiating for the Cornwall interests, and Howard at that time subscribed for nineteen (19) of the bonds of the North Western to help Dingee in the purchase of the Cornwall interest (See Howard's interesting testimony on this subject). Howard speaks of the inadequate rolling stock of the company: he concedes that the road was not a great commercial success; and he declares that the road looked to the projected cement plant at Kendall to give the eastern end of the road an efficiency and value which it did not theretofore possess. At all events, Howard, addressing Dingee, declared to him that "You want
 "eventually to sell the road and we must keep in
 "mind the fact that it should not be handicapped
 "with an unprofitable contract with the Cement Co.
 "which might militate against the sale" (See letter of September 24, 1906, Record, Vol. III, p. 795). Howard admits that there was no cement market upon the route of the B. B. & B. C. Ry.: that no freight rate was ever definitely established with any connecting carrier; and that the road suffered from "pressing

needs." And that the road was not a commercial success, and that its needs were very pressing may be gathered, also, from the testimony of the Auditor for the road who declared that the net earnings of this magnificent enterprise for the fiscal year ending June 30, 1908, were the enormous sum of \$28.98 (Record, Vol. III, p. 687). Is it any wonder that this small concern, of insignificant mileage, should suffer, as Howard said it suffered, from the original sin of bad location and poor equipment? Its mileage, upon its main line, was only 49.47 miles, and upon its spurs, only 18.06 miles (Record, Vol. III, p. 687). And Howard complains of its "small equipment of cars," and urges "more rails are needed to improve the line."

Shall we be particularly astonished if we are told that this small concern was burdened by debt upon bond account and floating indebtedness? Its bond account amounted to \$659,000.00 (Record, Vol. III, p. 686): its floating indebtedness had climbed to the sum of \$263,834.42 (Record, Vol. III, p. 686); and in other words, in round numbers, its debt was about \$20,000 per mile. Is it any wonder that an additional bond issue was projected? But when the additional bond issue was projected, and application made to Rollins & Sons, the bond experts, to float the projected additional bond issue, these experienced men flatly declined to touch the thing.

None of these people ever regarded the purchase of the B. B. & B. C. Ry. as a permanent investment:

they sought to control it only to sell it. The road was like Hodge's razors in the poem of our school days: it was controlled only to be sold. Even Taylor was anxious to sell it; and its sale was always in the contemplation of the parties.

To sum it all up in the language of Howard, who was for some time one of its officers, it was just "struggling to keep afloat": it was not keeping afloat easily: it was not keeping afloat without effort: but it was "struggling to keep afloat." And it was the stock of this magnificent jerkwater enterprise that Dingee embezzled, made away with, and along with other securities illegally pledged to one stranger company to cover the debt of another stranger company.

Limestone Deposits. Howard was not qualified either by training or experience to express an opinion upon this subject matter. He never even got upon the ground to make any real examination of the deposits. He nowhere descends to such vulgar details as length or depth, but, the bellows giving out, he stands apart, at gaze, and with his Argus optic, pierces even unto the bowels of Mother Earth. He substitutes conjectures and epithets for facts: but in the eyes of experienced Judges, epithetic testimony has no value whatever—it is open to those lines of condemnation, which are so frequent in negligence cases, of the testimony of witnesses who undertake to say that the train was traveling at a "frightful" rate of speed, or

that the automobile was going at a "terrible" gait. And the futility of Howard's conjectural guessing is fully exposed by the testimony of Civil Engineer Davis, which will be referred to in a moment.

Summary as to Howard. After all, perhaps Howard's real view of the value of this enterprise and its assets may be illustrated by the fact that he never put into it a single dollar of his own money. He never subscribed to a single bond: he never paid a single dollar for a single share of stock: to use his own language, he was not "a bona fide investor of money" (Record, Vol. II, p. 543).

Summary as to this Testimony. Aside from Kendall itself, the Company had no real assets: its only visible assets, if they can be called such, were the lands at Kendall; and it had none other. Both Evans and Howard were incompetent to fix the land values at Kendall. Their actual acquaintance with the lands was limited: they were but rarely upon the lands, and then only for short intervals; and it does not even appear, according to our recollection of the testimony, that either of them ever succeeded in actually climbing the hill. A mere opportunity afforded for observation will not constitute one an expert or render his opinion admissible as evidence (*Goldstein vs. Black*, 50 Cal., 462, 465; *Est. of Blake*, 136 Id., 306, 307): but neither Evans nor Howard had any real opportunities for observation: they never had the op-

portunity to become qualified to speak concerning this land. They were ignorant of, and did not pretend to state, their intrinsic or market values; and their views, such as they were, were mere speculative guess-work. And the actual price paid for the lands, although special prices at that, are quite inconsistent with their views, thus, \$4,000.00 were paid for the Mansard piece, and \$6,000.00 for the Riedle claims, and \$6,000.00 for the Zender farm, and \$1,800.00 for the Howard 80 acres, aggregating \$17,800.00 in all.

This company, then, was a mere speculation, doubtful from the start, and ending in failure. Its land area was restricted to 520 acres, of which much was waste land. Its available area was small, not exceeding 80 acres. Near by were business rivals,—the Balfour Guthrie Co. It was burdened by heavy obligations,—by its open account, its bond account, and its interest account. Its funds were in large measure diverted from it. It suffered from consequent lack of development and achievement. It had no works, mill, factory or plant. It had earned no income, and none was expected or possible. It paid no dividends. It had no sinking fund. It produced nothing. In March, 1908, Mr. Evans understood the situation perfectly. He knew that the security was wholly insufficient to cover the loan. He knew that this non-producing hole in the ground was no representative for the bonds, that no works were established, and that the condition of its affairs foreshadowed disaster. He

knew that Howard had never invested a dollar of his own money at Kendall, that Howard did not think that the investment was there, and that there was not any going concern there; and, as an acute and experienced business man, he must have known that if any trustee had dared to invest trust funds in such a misadventure, no chancellor on earth would hesitate to surcharge his account with the amount so invested.

Views of Davis. The criticism presented is supported by the views of Civil Engineer Davis: Record, Vol. II, p. 579-588; 596-600.

He went to Kendall in April, 1907, and remained until Sept., 1908:

13 quarter sections of 40 acres each, was the total area:

The 4 upper sections, or Riedle sections, were upon the side of a hill at an elevation of 1000 or 1200 feet: "that was hilly and rocky":

These were 20 acre claims:

Between these and the Zender farm, coming down the hill, were the Howard claims: 4 of 20 acres each:

Of the Riedle 80 acres, only 12.14/100 acres were cleared:

These Riedle acres are worthless for agriculture, being too high, too steep, rocky and without soil:

The same is true of the Howard 80 acres.

The only development work that was at all done on these Howard 80 acres was the building of a little shack on Claim No. 2:

Below the hill, at the portion where the plant was to be installed, 60 acres were cleared, of which 40 were grubbed, and this was the total amount of development work:

The entire tract was very poor for agriculture, being a mass of rocks, without top soil, except one 40 acre patch, one 20 acre patch, and a piece on the Howard claim about 20 by 30 feet in size:

Zender procured the hay for his cattle at Bellingham:

Davis procured his labor among the farmers of the district: at \$5 or \$6 per day, they made more money teaming than they did on their farms:

There were four or five months of winter, when the sun would rise about 7 or 7:30, and it would commence to get dark about 3:30 or 4:

Lime deposits were found on two of the Riedle claims and two of the Howard claims, but nowhere else on this territory:

No exploration work was done for the purpose of determining the extent of the visible lime deposits:

He could form no judgment as to the extent of the lime deposits,—as to how much rock was there, or how far the rock went down or in.

The deposits there would not authorize the erection of a plant of any particular capacity without further exploration: no further exploration was made:

The plant to be erected there was to be a 5000 barrel per day plant capable of being doubled:

An adequate exploration and examination of the lime deposits could not be done under six months: it was not possible to do such a thing in twenty-four hours:

Actual Work Done on the Premises:

Cleared 60 acres: 40 acres grubbed; one mile graded for spur track: this spur track space was 100 feet wide: cut ties for track: laid 5000 feet of track.

Structures:

A few rough shacks.

The first lime deposit was 600 feet above level of the flat:

All of our machinery and tools were shipped to Santa Cruz by Mr. Dingee's directions, in August, 1908:

So far as these bonds are concerned, all that the Standard got was the promise to pay of a corporation known by all to be a failure and to be destitute of any assets to support that promise: so far as the stock is concerned, what surplus profits would it entitle the Standard to participate in, or in what assets remaining upon dissolution after payment of the N. W. Co.'s

debts? Is it any wonder that Evans wanted to get rid of them? Can we not now understand why his mind reverted to the criminal liability of Dingee? Is it not plain that he fully realized that these wretched badges of failure and misappropriation represented nothing? And what greater fraud could have been put upon the Standard than to unload upon it these worthless scraps of paper? And that, too, at par and with the accrued interest.

Pepper vs. Addicks, 153 Fed., 383;

Cf. Slater Trust Co. vs. Randolph Coal Co.,
166 Id., 171.

The Position of the N. W. Co. Further Considered.

Let us look a little more closely into the position of the N. W. Co., so as to assist us on this question of consideration, in assessing the equity or inequity of a transaction whereby the worthless securities of a bankrupt concern are, by agreement with a faithless fiduciary and with the connivance of his puppets, put off at par upon an innocent corporation.

1. *The Corporate Character of the N. W. Co.*

What was there in this to justify the claim that the bonds and stocks were worth par to the Standard? Or worth anything to it?

A. *Corporate Franchise.* This was worthless. Calling it a privilege to transact certain business in a certain way, within the State of Washington, and with-

in the limitations of the Washington legislative scheme regulating foreign corporations,—still, it was a privilege which had become practically nullified by the treason of Dingee upon the one hand, and by the activity of alert business rivals upon the other; and it was a privilege which had become worse than useless, because the vehicle for spoliation, treachery and dishonesty.

Earning capacity is a correlate of the value of a corporate franchise:

Wilcox vs. Gas Co., 212 U. S., 19; 53 L., 382;

S. V. W. W. vs. S. F., 165 Fed., 695;

Montgomery Co. vs. Schuylkill Bridge Co., 28 Atl. (Penn.), 408.

In *S. V. W. W. vs. San Francisco, Supra*, it was observed by Circuit Judge Gilbert that the “value of the franchise and “going business depends upon their earning power”; and in *Montgomery Co. vs. Schuylkill Bridge Co., supra*, the opinion in which case is approvingly quoted by Circuit Judge Gilbert in *S. V. W. W. vs. San Francisco, supra*, while speaking of the value of a corporate franchise the Court says:

“Their value necessarily depends upon their productiveness. If they yield no money return over expenditures, they would possess little if any present value” (p. 408).

But the most powerful microscope producible by

the combined energies of modern scientific men would be utterly incapable, if applied to this record, to discern therein any "earning power" or "productiveness" of the franchise of the North Western Portland Cement Company.

B. *Non-exclusive Character of this Franchise.* And in point of fact, as we shall see more fully hereafter, other more alert and more honest business rivals actually did seize the field.

C. *And the N. W. Co. was a "Foreign Corporation."* It was thus subject to restrictions and limitations, both existent and possible, arising from Washington Statutes or changes of corporate policy.

And it was a corporation formed in one State for the acknowledged and avowed purpose of exercising in fact its principal activities in another State.

Elliott, Corporations, Sec. 550: Not favored.

2. *Original Cost of Construction of Plant.*

Plant defined:

Old Colony Trust Co. vs. Standard Sugar Co.,
150 Fed., 677.

But: no plant having been established, and the only tangible asset being the land, what does the record exhibit as to that? Taking outside figures, we have:

Mansard:\$4000.

Riedle: 6000.

Zender: 6000.

Howard: 1800.

Total actual cost of land: \$17800.

These figures are, however, subject to serious discounts:

A. *The Land in General.* A fair consideration of all the evidence in this case makes it very clear that this land was not purchased at a price established by public sales in the way of ordinary business: But the phrase "Market value" is defined in the *Am. & Eng. Ency. of Law* (19 *Ency. Law*, 2nd Ed., 1153) to be a "price established by public sales in the way of ordinary business"; and the authorities collected in the accompanying note are themselves, as well as the definition itself, entirely inconsistent with the theory that the value of land is to be admeasured by the peculiar personality or special purposes of a corporation or individual. There can be no middle ground between the universally accepted criterion of market value, upon the one hand, and the personal needs or special uses of the individual, upon the other: the former is impersonal: it is independent of the individual: it is a growth or product from the usual operations of business: it takes no account of the private needs, capricious judgments, or fanciful valuations of individuals; and while it possesses a certain measure of stability, the fancy estimates of value of

property to the owner are as fickle and fluctuating as the special uses, private views, whims or personal greed of individuals.

But a fair analysis of all the evidence in this cause shows the case to be one wherein special prices were paid for a special use,—the special use of a proposed cement plant: aside from its availability, such as that may or may not have been, for this special purpose; this land was of no value to any of these speculators, none of whom were farmers or wood-cutters, or had any intention of withdrawing from the civilized world in order to farm or hew wood in a wilderness whose denizens made more money driving teams than they did in farming. The plain fact is that, the line deposits aside, the only other value that this land had was the natural timber that was there when the place was located; and even this timber was more or less scattered.

And Mansard, Riedle and Zender knew what was what: they fully understood the situation, and acted accordingly: ordinary self-interest would impel them, knowing what the land was wanted for, to get all that the traffic would bear; and every consideration suggested by one's knowledge and experience of that human nature which is a part of the evidence in every case concurs in repelling the thought that they were making presents to persons whom they were not in any way obligated to. To quote Mr. Justice Brewer:

“Human nature is something whose action can never be ignored in the courts, and parties who have acquired full and absolute title to property are not as a rule donating any interest therein to strangers.”

Louisville Trust Co. vs. Louisville, etc., Ry.,
174 U. S., 674, 688.

But the special price that may be paid because of a special, intended use, is not a proper criterion whereby to fix the value of land: such a criterion overlooks the impersonal character of market value, and confuses value with the special use of the intending purchaser. But the land is not to be valued in the light of any convenience or association which might make it peculiarly desirable to a particular purchaser who designs devoting it to a special use; on the contrary, it is to be valued solely with regard to the elements which would make up its worth to any person, generally.

The discount upon land values arising from the fact that a special price was paid because of a special, intended use, is general as to all the land: but there is a special discount as to the Howard 80 acres.

B. *The Howard 80 Acres.* I have put this item in at \$1800. but the reality was this:

80 acres at \$2.50 per acre, Government price \$ 200.

Other expenses: attorneys' fees, witness fees,
traveling expenses, etc..... 1600.

And the fact that Howard made the location under the Stone and Timber Act demonstrates the agricultural uselessness of these 80 acres. 7 Fed. Stat. Ann., 301: "unfit for cultivation."

And the only lime deposits were upon that $\frac{1}{2}$ of these 80 acres which included the first and second Howard claims,—in other words, less than 40 acres.

Davis, Record, Vol. II, p. 583.

3. *Amount Expended in Permanent Improvements.*

There were no "permanent improvements":

Stark vs. Starr, 1 Sawy., 15 Fed Cas.;

Cullop vs. Lenord, 33 S. E., 611.

Aside from compulsory development work, all that was done upon the premises was:

1 mile of spur-way;

60 acres cleared, of which 40 were grubbed; and
Setting up certain small, rough shacks.

4. *Appreciation or Depreciation of "Plant."*

Ever since Nov. 22, 1907, nothing has been done at Kendall: the monumental architectural relics there,—the shacks, to wit,—have been abandoned to the thaws of Spring, the heat of Summer; the winds of Autumn, and the snows of Winter; and the only caretaker that relevant history advises us about, is the caretaker for the Riedle claims perched on the top of the hill:

Howard, Record, Vol. III, p. 876.

There was no appreciation here,—depreciation only, and the waste and silence of desolation and failure.

5. *Amount of Bonded Indebtedness.*

Authorized Issue.....\$2,000,000.

Bonds actually sold, and de-

livered 284,000.

There is no measure of value to be found here:

S. V. W. W. vs. San Francisco, 124 Fed., 592-3;
Knoxville vs. Knoxville Water Co., 212 U. S.,
 1, 11; 53 L., 379, at bottom 1st column and
 top 2nd column.

6. *Permanence and Stability of "Plant."*

Here, there was no plant of which either permanence or stability could have been predicated.

7. *Earning Capacity of "Plant."*

Here, the earning capacity was nil. Nor could any earnings be honestly expected: for the place was destitute of plant: it was destitute of improvements: there was no mill upon it: there was no railroad upon it: there were no shipping facilities upon it: it never had a yearly use: it never had an annual value: it never produced a pound of cement: it has been an unqualified failure; and to the complete knowledge of Evans and his adherents, the place has remained an undeveloped, unimproved and unproductive waste. And

when we consider the varying capabilities of soils even within restricted areas, the uncertain cost of production, the uncertainties of labor, the vagaries of weather and climatic conditions, the doubtfulness of yields, the eccentricities of prices and profits, the effect upon large concerns of changes of governmental policies, and so on, we realize that nothing could well be more speculative than the hazarding of a guess as to the future earning capacity of an enterprise that never had an actual beginning, but whose whole history is an illumination of the word "loot."

8. *Intelligent and Skilful Management.*

Here, there was nothing to manage: ever since Nov. 22, 1907, all operations have ceased; and no audible voice has told us anything of any resumption of operations.

9. *Risks of the Business.*

Here, there was no business to endure or weather any risks. We do know, however, that the N. W. Co. was surpassed by more alert business rivals.

10. *There was no "Going Concern."*

Knoxville vs. Knoxville Water Co., 212 U. S.,
1, 9; 53 L., 378.

In the Knoxville Water Case, *supra*, while discussing the valuation of the property, and considering an

item of "\$60,000 for 'going concern,'" Mr. Justice Moody, in delivering the unanimous opinion of the Court, said:

"The latter sum (\$60,000 for going concern) we understand to be an expression of the added value of the plant as a whole over the sum of the values of its component parts, which is attached to it because it is in active and successful operation and earning a return."

How a mere negation,—without any plant, or business, or management, or production, or earning capacity, that never produced a single pound of cement, that never earned a single dollar, that had expended upon it only what Evans described as "very little," and that has been abandoned since 1907,—how such a negation can be called a "Going Concern," resembleth the peace of God, in this, that it passeth all human understanding. And is it any wonder, then, that long before that conclave of the powers and "crowned heads" which occurred in March, 1908, and long before the notes in suit were issued, Evans knew that this sham was not a going concern?

Record, Vol. I, p. 192.

II. *The N. W. Co. was Insolvent in the Winter of 1907-8, and thereafter.*

A. *Elements of Insolvency.*

a. *Its Assets were grotesquely insufficient to meet its liabilities.*

Only Real Assets: 520 acres of land costing \$17,800.

But this land, as we have seen, was purchased at a special price for a special use.

Liabilities: On Bond Account alone, \$284,000.

And the proceeds from these bonds were not in the corporate treasury, but were diverted from proper corporate purposes and misappropriated.

b. *The N. W. Co. was not "prosecuting its line of business."*

In plain truth, it had never reached the point where it had any business to prosecute.

c. *Since Nov. 22, 1907, there has been no prospect or expectation of the N. W. Co. continuing business.*

The record leaves no doubt about this: nothing has been done that we are advised of, since Nov. 22, 1907, when all operations ceased; and if any enterprise may fairly be described as abandoned, this one may.

Not only have all operations ceased, but all machinery and tools have been removed, and have never been returned so far as we are informed.

And Dingee's assurances to Evans that the enterprise would continue,—assurances that time has belied,—were utterly rejected by Evans:

Record, Vol. I, p. 191-2.

d. *The N. W. Co. was not a Going Concern.*

Evans' direct testimony to that effect: Record, Vol. I, p. 192.

And the Supreme Court definition leaves no doubt of it. Going Concern is "the added value of a plant
" as a whole over the sum of the values of its compo-
" nent parts, which is attached to it because it is in
" active and successful operation and earning a re-
" turn."

Knoxville vs. Knoxville Water Co., 212 U. S.,
1, 9; 53 L., 378, Moody, J.

e. *In Nov. 1907, there was a cessation of all operations.*

This is the direct and uncontradicted testimony of Civil Engineer Davis.

f. *Most significant steps were taken which practically incapacitated the N. W. Co. from pursuing the enterprise.*

These included:

The misappropriation of its funds.

The cessation of all operations.

The removal of all machinery and tools.

g. *The embarrassments of the N. W. Co. were such that failure was inevitable.*

Thus:

It was dominated by a faithless fiduciary.

Its funds had been misappropriated.

Its B. B. & B. C. Ry. stock had been embezzled to make an unlawful pledge to assist a strange corporation.

Its operations had all ceased.

Its machinery and tools had all been taken away.

The abandonment of the plant was permanent (*Castle vs. Logan*, 140 Fed., 707, 709); and since November, 1907, there has never been any recurrence of operations on the plant in question.

The views of Taylor, President of the Bellingham Bay & British Columbia Railway, throw some additional light upon the rational method of assessing the value of the bonds of a commercial enterprise. Speaking of Taylor, Howard tells Dingee:

"Mr. Taylor says the debt stands:

Bonds	\$659,000.00
Due D. O. Mills.....	111,000.00
Due B. & D. Coal Mining Co.....	139,000.00
	<hr/>
	\$909,000.00

"Further, that the deed of trust contains many objectionable provisions that were inspired or permitted by P. B. Cornwall; that the latter's connection with this bond issue was in some way not creditable; that E. H. Rollins & Sons have the call on the balance of the bonds at \$95.00; that

bonds may be issued only on main line construction and that the road must always earn double the amount of the bond interest" (Letter from John L. Howard to W. J. Dingee, dated San Francisco, March 5, 1907: Record, Vol. III, p. 815-6).

But the mythical concern known to disappointed bondholders as the Northwestern Portland Cement Company never earned "double the amount of the bond interest," never earned "the amount of the bond interest," never earned a dollar; and if it be true, as we think it is, that earning capacity be considered as a test or correlate of the value of the bonds of a commercial enterprise, then the bonds here involved are worthless.

On March 21, 1907, Howard writes Bachman advising him that Rollins & Sons, the bond experts, will not place the new bond issue of the B. B. & B. C. Ry.—a concern then earning for its year's work at least \$28.98 (Record, Vol. III, p. 687: Testimony of E. H. Hammond, General Auditor of B. B. & B. C. Ry.), which was \$28.98 more than the Northwestern Portland Cement Company ever earned; and with this letter, Howard encloses to Bachman a letter from Taylor setting forth the views of Rollins & Sons as to what constitutes "salable bonds," and in that regard Taylor says, speaking of the representative of Rollins & Sons: "He claimed that if the new improvement coupled " with the increased business, should increase the earn-

“ings of the road to the extent that we anticipate, the bonds would be salable, but not otherwise” (Record, Vol. III, p. 819). From this passage, it is plain that the bond expert looked to the earning capacity of the concern in question to give value to the bonds and make them “salable”: very plainly, he knew that the bonds of a dead enterprise, which not only never earned a dollar, but died “a-bornin’” as the consequence of Dingee’s unlawful misappropriation of its funds, would have no value; and equally plainly it was to the effective development, progressive activity, tangible earning capacity, and accomplished results of the enterprise that he looked to give value to its securities.

And the same thought dominated the minds of the Howard bond holders: what they were concerned with in the spring of 1908, was the establishment of the plant at Kendall and the prompt production of cement there; and they took no account of any other consideration, nor of any scraps of claims against other tottering or struggling companies. Evans, in his deposition, after admitting his desire to get rid of these bonds, makes it entirely clear that he predicated his own conception of the value of these bonds upon the establishment of the plant at Kendall, upon his faith in the establishment of which plant he had subscribed for the bonds; for he tells us that, “I considered that it was not right that this Northwestern Portland Cement Company should be a loaning institution, which it vir-

tually was—that I subscribed my money for legitimate commercial purposes” (Record, Vol. I, p. 192-3). And so too with Howard, as we have seen, it was to the plant that he looked to give any value to the bonds. Indeed, the proposition that, in March 1908 and about the time of the conclave of the “crowned heads”—to adopt Howard’s phrase—these bond holders were concerned with the establishment of the plant at Kendall, and were not then looking to the after thoughts subsequently conjured up by the ingenuity of counsel: the proposition that the bond holders then looked to the establishment of the plant at Kendall to give value to the bonds, and that when the establishment of that plant failed in consequence of Dingee’s defalcations they wanted to get rid of the bonds and get their money back, regardless of any other consideration,—the proposition that they regarded the plant as the backbone of the bonds and that they felt, when that was broken, that the bonds had no value:—this proposition we submit, finds ample support throughout this record. During the spring of 1908 these Howard bond holders considered that the value of the bonds was dependent upon the establishment of the plant at Kendall, and these bonds ceased to have any value, either in their eyes or in fact, when they learned that their hopes for the plant had been shattered by Dingee’s embezzlements. It is respectfully submitted that no man of affairs can read this record without perceiving that what was in the bond holders’ minds

at the time when this transaction took place was that these bonds were worthless, because the plant had not been established, and that this record can not be analyzed without leaving the conviction that the reasons which these bond holders had for the action which they pursued are all reducible to Dingee's criminal failure to establish the plant at Kendall. The bond holders give no place in their minds at the time when this transaction took place to any claim by the Northwestern Company against corporations like the B. B. & B. C. Railway which, as Howard tells us, was "suffering from the original sin of bad location and cheap construction" (Record, Vol. III, p. 810), which was encumbered by a heavy bonded and floating indebtedness and which was just "struggling to keep afloat" (Record, Vol. III, p. 860); nor did these bond holders predicate any of the reasons they had for the action which they pursued upon the Santa Cruz Portland Cement Company, whose product, as Howard tells us, was a failure until as late as June, 1908, whose success, Howard tells us, was far from assured, and the offer of whose note by Dingee these very bond holders rejected. On the contrary, in their minds at the time when this transaction took place, the one and only source of value of these wretched bonds was to be found in the establishment of the plant at Kendall; and when that failed by reason of Dingee's criminality, which was so prominent in the minds of Evans and his brother, these bond holders realized that the bonds had

no value and that, to use Evans' phrase, they should be got rid of (Record, Vol. I, p. 192-3) : we respectfully submit, in a word, that from this record no other conclusion can be drawn except this, that in the minds of these bond holders at the time when this transaction took place, and in point of fact also, the value of these bonds and the establishment of the plant, were reciprocal and complementary quantities, that one was dependent upon the other, and that the failure to establish the plant destroyed any pretended value of the bonds, reduced them to such condition of worthlessness that the single anxiety of these bond holders was to get rid of them.

II.

THERE HAS NEVER BEEN ANY DELIVERY OF THE ALLEGED BONDS OR STOCKS TO THE STANDARD PORTLAND CEMENT CORPORATION.

When the minds of the parties met on March 25-26, 1908, and as the result of that meeting of minds, a concerted plan of action was agreed upon, to be carried out subsequently by Dingee with the aid of his subservient vassals upon the directorate of the Standard Portland Cement Corporation, Evans endorsed the certificates in blank, and sent them, together with the alleged bonds, not to the Standard Portland Cement Corporation at all, but to John L. Howard, the go-between who acted for the Howard bond holders in

the interviews with Dingee. The letter of April 13th, 1908, which appears on page 167 of Vol. I of the Record, transmits two thousand (2,000) shares of N. W. Co. stock, and gives the numbers of certificates transmitted, and also the number of shares covered by each certificate. Nearly all of these shares were subsequently endorsed to the order of Dingee, and thereafter to L. F. Young, trustee. Thus, certificate No. 65 apparently wrongly referred to on page 197 of Vol. I of the Record as Certificate No. 165, was so endorsed: so also Certificate No. 66: so, also, Certificate No. 68: so also Certificate No. 69 apparently wrongly referred to as Certificate No. 169; and these certificates account for 1,450 out of the 2,000 shares, all of which were endorsed to the order of Dingee, and subsequently transferred to L. F. Young, trustee, but none of which appear to have been endorsed or transferred to the Standard Corporation. At the time when Evans sent down these bonds and stocks to his friend Howard, Mr. Young was Secretary of the Santa Cruz Company, the Standard Company, the Standard Corporation, and the Santa Cruz Lime Company, with his office in the Crocker Building in San Francisco: he was Secretary for each of these companies individually, and not for them as a mass of corporations; and each of these companies "kept its accounts and assets separate from those of the others." As part of the plan and program which had been arranged at the meeting of March 25-26, 1908, Norcross, who at this time was

Secretary of the Western Fuel Company, and also of the Western Building Materials Company, of each of which companies Howard, the go-between, was President, brought certain bonds and stocks to Mr. Young, which are claimed to be the bonds and stocks "purchased" by the Standard Corporation. Mr. Young received the stock and bonds on May 4th or 5th, 1908; and since the alleged special meeting of the directorate of the Standard Corporation was held on May 5th, 1908, it is evident from these facts, as well as from the entire history disclosed in this cause, that whatever occurred between Mr. Norcross and Mr. Young, occurred as part and in furtherance of the prearranged scheme which had been entered into on March 25-26, 1908. At this time, all of these parties, Evans, acting for himself and his assignors, Howard and Dingee, were all acting together and in concert to accomplish a common design, which design, as we know was directed against the Standard Corporation. This design was formulated at the meeting on March 25-26, 1908: all that transpired subsequently in relation to the alleged "purchase" of the bonds of the Northwestern failure by an outside corporation which had neither need nor funds to purchase them, occurred by reason of, and was inspired by, the concerted purpose of these confederates; and what each of them did in furtherance of the common design, is properly chargeable against all of them. The common design, however, was not accomplished until fully completed, and until

that point was reached the acts, conduct and declarations of any one of the confederates would be provable against and binding upon the co-confederates.

Mr. Young's testimony shows plainly that these bonds and stocks never got into the treasury of the Standard Corporation, but on the contrary by direction of one of the confederates, Dingee, he put these bonds and stocks into the treasury of the Northwestern Company. And Mr. Young made the following uncontradicted statement: "I have held the actual possession of the bonds ever since they were delivered to me by Mr. Norcross. Neither the Standard Portland Cement Corporation nor anybody else has ever made any demand on me for these bonds; neither the Standard Portland Cement Corporation nor anybody else, to my knowledge, has even done anything to secure the possession of either the bonds or the stock. I will state this, that I am ready, willing and anxious to deliver these bonds to anybody who is the real owner, and I hold them for that purpose" (Record, Vol. III, p. 943).

And later on, at page 955 of the same Volume the following occurred:

"MR. BROBECK—Q. Yesterday, in response to a question by Mr. Olney reading as follows: 'Has the Standard Portland Cement Corporation to your knowledge ever done anything to secure the possession of either the bonds or the stock?' you answered, 'No, nobody has, to my knowledge.

I will state this, that I am willing and anxious to deliver these bonds at any time to anybody who is the real owner, and I hold them for that purpose.' What meaning did you intend to convey by that answer, Mr. Young?

"A. I thought that perhaps Mr. Dingee might complete the transaction as I understood it was made—might take up the notes and demand the bonds himself or they might belong to the Northwestern Portland Cement Co. When I received these bonds, Mr. Dingee instructed me to put them in the treasury of the Northwestern Portland Cement Co. The Standard Portland Cement Corporation has never, to my knowledge, asserted any title to these bonds or suggested to me that I held them subject to any right which they might have to them."

These bonds and stocks were never listed among the assets of the Standard Corporation, nor have the notes ever been charged or listed among the liabilities of that corporation (Young, Record, Vol. III, p. 718; Cole, Record, Vol. III, p. 768-9).

The net result of all the testimony upon this subject matter is that whatever may or may not have happened to these bonds and stocks, one thing is clear, they did not get into the treasury of the Standard Corporation; and that company never acquired any possession of them or any dominion or control over them. Whether this was right or wrong would seem to be something of an academic question: at all events no one need be sur-

prised by the commission of any wrong by Dingee: but all that does not, nevertheless, put the bonds and stocks into the treasury of the Standard Corporation, so that it could exercise control over them. On the contrary, these bonds and stocks went beyond the control of the Standard and into the treasury of the Northwestern: do Messrs. Howard and Evans wish the Standard Corporation to burglarize the treasury of the Northwestern Company? It may be added that there must be acceptance to constitute a delivery (*Bank vs. Bailhache*, 65 Cal., 327; *Powell vs. Banks*, 48 S. W. (Mo.), 664; *Tate vs. Clement*, 35 Atl. (Pa.), 215; *Davenport vs. Whisler*, 46 Ia., 287; *Rosseau vs. Blean*, 14 N. Y. S., 712, 716): but what proof is there before this Court of any acceptance of these bonds or stocks by the Standard Portland Cement Corporation?

III.

A FRAUDULENT BREACH OF TRUST WAS COMMITTED BY DINGEE AGAINST THE STANDARD CORPORATION.

In approaching this subject matter, it is proper to bear in mind certain principles in the light of which, we submit, this controversy should be resolved. " 'Equity jurisdiction,' therefore, in its ordinary ac-
" ceptation, as distinguished on the one side from the
" general power to decide matters at all, and on the
" other from the jurisdiction 'at law' or 'common-law
" jurisdiction,' is the power to hear certain kinds and

“ classes of civil causes according to the *principles* of
 “ the method and procedure adopted by the court of
 “ chancery, and to decide them in accordance with the
 “ doctrines and rules of equity jurisprudence, which
 “ decision may involve either the determination of the
 “ equitable rights, estates, and interests of the parties
 “ to such causes, or the granting of equitable reme-
 “ dies.”

Pomeroy's Equity Jurisprudence, 3rd Edition,
 Section 130.

And that the expansion of equitable remedies has kept pace with the increasing complexities of modern business relations is entirely clear from the views expressed by the Supreme Court. Thus, it is observed by Fuller, C. J., in *U. P. R. R. vs. Chicago, etc., R. R.*, 163 U. S., 600, that “In the increasing complexi-
 “ ties of modern business relations equitable remedies
 “ have necessarily and steadily been expanded, and no
 “ inflexible rule has been permitted to circumscribe
 “ them”; and to quote the language of Daniel, J., in *Byers vs. Surget*, 60 U. S. (19 Howard), 308, “The
 “ true and intrinsic character of proceedings, as well in
 “ courts of law as *in pais*, is alike subject to the scrutiny
 “ of a court of equity, which will probe, and either
 “ sustain or annul them, according to their real char-
 “ acter, and as the ends of justice may require.” Mr. Justice Harlan, in *White vs. Gotzhausen*, 129 U. S., 344, tells us that “Courts of equity are not to be misled

by mere devices, nor baffled by mere forms": Chief Justice Chase, in *Texas vs. Hardenberg*, 77 U. S. (10 Wallace), 89, tells us that "Equity looks through forms to substance"; and in *Jones vs. New York Guaranty Co.*, 101 U. S., 628, Mr. Justice Swayne said "Nor will it (a court of equity) give its aid in the "assertion of a mere legal right contrary to the clear "equity and justice of the case."

In the next place, in approaching the question whether Mr. Dingee committed a fraudulent breach of trust against the Standard Corporation, it would not, we assume, be irrelevant to present, if not a definition, at least a description of what constitutes fraud in equity; and perhaps as succinct a statement upon that subject as any, is the following, taken from the last Edition of Bouvier:

"Equity Doctrine of Fraud. It is sometimes inaccurately said that such and such transactions amount to fraud in equity, though not in law; according to the popular notion that the law allows or overlooks certain kinds of fraud which the more conscientious rules of equity condemn and punish. But, properly speaking, fraud in all its shapes is as odious in law as in equity. The difference is that, as the law courts are constituted, and as it has been found in centuries of experience that it is convenient they should be constituted, they cannot deal with fraud otherwise than to punish it by the infliction of damages. All those manifold varieties of fraud against which specific

relief, of a preventive or remedial sort, is required for the purposes of substantial justice, are the subjects of equity and not of law *jurisdiction*.

“What constitutes a case of fraud in the view of courts of equity, it would be difficult to specify. It is, indeed, part of the equity doctrine of fraud not to define it, not to lay down any rule as to the nature of it, lest the craft of men should find ways of committing fraud which might escape the limits of such a rule or definition. ‘The court very wisely hath never laid down any general rule beyond which it will not go, lest other means for avoiding the equity of the court should be found out.’ *Per Hardwicke, C.*, in 3 Atk., 278. It includes all acts, omissions, or concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. ‘It may be stated as a general rule that fraud consists in anything which is calculated to deceive, whether it be a single act or combination of circumstances, whether it be by suppression of the truth or suggestion of what is false; whether it be by direct falsehood, or by innuendo, by speech or by silence, by word of mouth or by a look or a gesture. Fraud of this kind may be defined to be any artifice by which a person is deceived to his disadvantage.’ *Bisph. Eq.*, Sec. 206.

“It is said by Lord Hardwicke, 2 Ves. Ch., 155, that in equity fraud may be presumed from circumstances, but in law it must be proved. His meaning is, unquestionably, no more than this: that

courts of equity will grant relief upon the ground of fraud established by a degree of presumptive evidence which courts of law would not deem sufficient proof for their purposes; that a higher degree, not a different kind, of proof may be required by courts of law to make out what they will act upon as fraud. Both tribunals accept presumptive or circumstantial proof, if of sufficient force. Circumstances of mere suspicion, leading to no certain results, will not, in either, be held sufficient to establish fraud.

"The equity doctrine of fraud extends, for certain purposes, to the violation of that class of so-called imperfect obligations which are binding on conscience, but which human laws do not and cannot ordinarily undertake to enforce; as in a large variety of cases of contracts which courts of equity do not set aside, but at the same time refuse to lend their aid to enforce: 2 *Kent*, 39; 1 *Johns. Ch.*, 630; 1 *Ball & B.*, 250. The proposition that 'fraud must be proved and not assumed,' is to be understood as affirming that a contract, honest and lawful on its face, must be treated as such until it is shown to be otherwise by evidence, either positive or circumstantial. Fraud may be inferred from facts calculated to establish it. Per Black, C. J., in 22 Pa., 179; 148 Id., 234; 59 Fed. Rep., 70.

"The following classification of frauds as a head of equity jurisdiction is given by Lord Hardwicke, J., in *Chesterfield vs. Janssen*, 2 Ves., 125; 1 Atk., 301; 1 *Lead Cas. Es.*, 428.

"1. Fraud, or *dolus malus*, may be actual, aris-

ing from facts and circumstances of imposition. 2. It may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would make, on the one hand, and no honest or fair man would accept, on the other. 3. It may be inferred from the circumstances and condition of the parties: for it is as much against conscience to take advantage of a man's weakness or necessity as of his ignorance. 4. It may be collected from the nature and circumstances of the transaction, as being an imposition on third persons."

Bouvier, Vol. 1, 844-5.

And in this connection, it may be pointed out that a very satisfactory definition of breach of trust will be found in Sec. 1079, of *Pomeroy's Equity Jurisprudence*; and that in Sec. 1094 of the same authority we see the carriage of Pomeroy's concept of "Breach of Trust" into corporate affairs.

It must, however, be plain to the simplest apprehension that fraud, and especially corporate fraud, is a secret and devious thing, and the more so in proportion to the intelligence and experience of the participants. Thus, in holding that subsequent facts may be utilized to establish an antecedent fraud, the local Supreme Court observes:

"The proofs in cases of fraud are usually circumstantial: frauds are a species of the *crimen falsi*, which, like larceny, are not done openly.

They are usually shown as inferences from facts established, rather than as facts expressly proven."

Butler vs. Collins, 12 Cal., 457, 464.

And the general characteristics of fraud are further explained in the following quotation from a recent Montana case:

"The great issue in this case was fraud. The existence of fraud was determined by an overwhelming line of findings by the jury. See statement of the case preceding this opinion. Fraud cannot often be proven by direct evidence. Fraud conceals itself. It does not move upon the surface in straight lines. It goes in devious ways. We may with difficulty know 'whence it cometh and whither it goeth.' It 'loves darkness rather than light, because its deeds are evil.' It is rarely that we can lay our hand upon it in its going. We are more likely to discover it at its destination, before we know that it has started upon its sinuous course. When we so discover it, the searchlight of a judicial investigation goes back over its trail and lightens it from beginning to end. As a woodsman follows his game by slight indications, as a broken twig or a displaced pebble, so fraud may become apparent by innumerable circumstances, individually trivial, perhaps, but in their mass 'confirmation strong as proofs of holy writ.' The weight of isolated items tending to show fraud may be 'as light as the shadow of drifting snow,' but the drifting snow in time makes the drift, the avalanche,

the glacier. Fraud may hang over the history of the acts of a man like the leaden-hued atmosphere upon the house of Usher, 'faintly discernable but pestilent, an atmosphere which has no affinity with the air of Heaven.' . . .

"In question of fraud a wide range of evidence is allowed. Fraud assumes many shapes, disguises, and subterfuges, and is generally so secretly hatched that it can only be detected by a consideration of facts and circumstances which are not infrequently trivial, remote and disconnected. To interpret their meaning, or the full meaning of any one of them, it may be necessary to bring them together and contemplate them all in one view. In order to do this it is necessary to pick up one here and another there until the collection is complete. A wide latitude of evidence is therefore allowed, in order that fraud may be detected and exposed."

Merchants' National Bank vs. Greenhood, 41
Pac. Rep., 259 (Mont.).

And from these general considerations, it obviously results that a preconceived, premeditated plan to defraud, specifically formulated in actual words, need not be exhibited by the evidence, if the natural effect of the acts of the parties charged be to secure the undue advantage denounced by equity.

It is obvious common sense that a man's declarations count for nothing if they are belied by his acts and conduct—his actions speak louder than words. In-

deed, under the California Code of evidence, demonstration of any fact in issue is never required (C. C. P., Sec. 1826); and even in criminal cases, where human life is at stake, it is from the surrounding facts and circumstances that one must gather the intent or intention of the actor (P. C., Sec. 21).

In all human controversies, it is to the acts and conduct of the party, rather than to his declamations, that the law looks in seeking to define his intention. As observed by an accomplished Federal Judge, "Men are not made with windows in their breasts through which we may read the motives of their conduct."

U. S. vs. Foster, 6 Fed., 247.

It is, however, fortunate, to adopt the language of another learned Federal Judge, that

"The laws of thought are not suspended when the inquiry arises in a court of justice."

Standard Elevator Co. vs. Crane Elevator Co.,
76 Fed., 767.

The rule that actions speak louder than words is applied by the courts to a great variety of circumstances, but no better illustration of the use of this rule can be suggested than cases involving the issue of fraud: for nothing avoids the light more than fraud. The result of all the relevant authorities is that a man's protestations of purity are not any answer to the effect

of his acts; and that if he is guilty of acts which defraud another, his declarations that his intentions were honest can not be taken as sufficient to overthrow his acts.

- Civil Code*, Secs. 1571-1574;
Thornton vs. Irwin, 43 Mo., 153;
Ashton vs. Dashaway Ass'n., 84 Cal., 61, 68;
Sukeforth vs. Lord, 87 Id., 399, 408;
Pacific Vinegar W'ks. vs. Smith, 145 Id., 352,
 369;
Cross vs. Cross, 15 N. E. (N. Y.), 333;
Coleman vs. Burr, 93 N. Y., 17, 31;
Babcock vs. Eckler, 24 N. Y., 623;
Cheatham vs. Hawkins, 80 N. C., 161, 165;
The Telegraph vs. Lee, 98 N. W. (Iowa), 364;
Bramblet vs. Com. Land Co., 83 S. W. (Ky.),
 599;
United, etc., Co. vs. Smith, 90 N. Y. D., 199,
 204;
First Nat. Bk. vs. Northup, 109 Pac. (Kans.),
 672, 675;
Thomas vs. Sweet, 14 Pac. (Kans.), 545, 556-7.

“Judicial inquiries are into the rights of the parties; and although high and honorable character has, and ought to have, great influence in weighing testimony in which that character is in any manner involved, yet, when the inferences from that testimony are drawn by others, and a court is required to pronounce the law arising upon

them, character is excluded from the view of the judge, and legal principles alone can be acknowledged as his guide."

Marshall, C. J. *Etting vs. Bank of U. S.*, 11 Wheat., 73.

"When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts, when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."

Holmes, J. *Aikens vs. Wisconsin*, 195 U. S., 206.

"It would be in vain to administer justice in such courts, if mere statements of intention would outweigh the legal effects of the acts of the parties."

Story, C. J., dissenting. *The Nereide*, 9 Cranch, 444.

"The ordinary rule (is) that a man is bound to

contemplate the natural and probable consequences of his own act.”

Brown, J. *Lazarus vs. Phelps*, 152 U. S., 85.

“The principle that no one shall be permitted to deny that he intended the natural consequence of his acts when he has induced others to rely upon them, is as applicable to insurance companies as it is to individuals. . . . This principle is one of sound morals as well as of sound law, and its enforcement tends to uphold good faith and fair dealing.”

Field, J. *Globe Mutual Life Ins. Co. vs. Wolff*, 95 U. S., 330.

In a case which involved the good faith of a party's intention, the Court said:

“These questions, for the want of, or notwithstanding the direct testimony of the parties to the transactions must have been peculiarly matters of probability to be determined by the conduct and acts of the parties and all the surrounding circumstances. Everything connected with the transactions between the parties calculated to throw any light upon the probable motives by which their conduct might be governed; everything tending to show the relations existing between them, and the feelings naturally likely to influence their action, in the absence of, or in conflict with the direct testimony on the subject, would be competent on the question of actual, bona fide intention.”

Blodgett Paper Company vs. Farmer, 41 N. H., 398, 403.

"Persons of sound mind and discretion must in general be understood to intend, in the ordinary transactions of life, that which is the necessary and unavoidable consequences of their acts, and they are supposed to know what the consequences of their acts will be in such transactions."

Clifford, J. *Clarion Bank vs. Jones*, 21 Wall., 337.

"A party cannot avoid the legal consequences of his acts by protesting at the time he does them that he does not intend to subject himself to such consequences."

White, J. *U. S. vs. Lamont*, 155 U. S., 310.

In *Babcock vs. Eckler*, the rule is stated thus:

"If the necessary consequence of a conceded transaction was a defrauding of another, then, as a party must be presumed to have foreseen and intended the necessary consequence of his own act, the transaction itself is conclusive evidence of a fraudulent intent: for a party cannot be permitted to say that he did not intend the necessary consequence of his own voluntary act. Intent or intention is an emotion or operation of the mind, and can usually be shown by acts or declarations, and, as acts speak louder than words, if a party does an act which must defraud another, his declaring

that he did not by the act intend to defraud, is weighed down by the evidence of his own act."

So in *The Telegraph vs. Lee, supra*, the Court said:

"Perhaps Mr. Lee did not intend to perpetrate a fraud on the corporation, but the result of his acts had that effect, and he cannot be permitted to profit thereby."

Per Sherwin, J., at p. 366, citing cases.

So in *Bramblet vs. Com. Land Co., supra*, speaking of a corporation president, the Court said:

"Whether the derelict officer acts from a mistaken notion of his rights, or from an actually fraudulent purpose, is immaterial, as affecting the invalidity of the transaction."

P. 602.

"The evidence in this case convinces me that the defendant's conduct in respect to the affairs of the companies involved in this controversy has not been actuated by any wrongful motive. It is clear that he, more than any one else, has given much of his time and labor to the building up of the plaintiff corporation and its constituent companies. Such has been his position as their most active and trusted manager and officer that it is perhaps only natural that he should have grown to believe that they should cheerfully allow him to have a controlling interest in all their affairs and in their respective properties. While he may be right in this

belief, the methods adopted to carry it into effect have not been such as the law will sanction. The defendant has lost sight of the fact that as an officer and director he is bound by the strict rules of conduct laid down by the law in its wisdom for the guidance of a trustee and for the sure protection of the *cestui que* trust. Judgment for the plaintiff."

United Mines, etc., Co. vs. Smith, 90 N. Y. S.,
204.

And, not to multiply quotations, it was said in *Thomas vs. Sweet, supra*:

"We are not prepared to say that such a contract as that entered into by Sweet, Huidekoper, and the Birmingham Iron Foundry is inherently vicious, nor is it necessary for the purpose of this opinion to vigorously denounce it; for even were it free from all shadow of suspicion, or the taint of fraud, if Sweet, in a secret manner, took advantage of it to buy the claims against the company at a large discount, with the funds of the company then in his hands as its treasurer, and recovered a judgment against the company for the full face value of the claims so purchased, with interest, he violated his trust, and every rule of justice, and every dictate of common honesty. There is a distinct allegation in the petition that the knowledge of the agreement, and the subsequent action of Sweet by virtue of it, did not come to the plaintiff in error until long after the rendition of the decree in the Huidekoper action, and

within two years before the commencement of this action. It may be that this allegation of itself is sufficient for the purpose of the pleading; but when it is strengthened by the nature of the facts alleged, and the very great probabilities of the situation, it seems but right to give a party who claims to have been greatly injured by reason of gross violations of ordinary trust and confidence an opportunity to prove the facts as charged. We think, with the exception of this comparatively recent and remarkable transaction, the contention of the defendant in error that the plaintiff in error in this action has been guilty of laches, is sufficiently sustained so as to banish from the consideration of the case all the other statements of causes of action against Sweet. But with respect to this one it has been so often declared by the courts—the rule is such a familiar one—that the law will not permit the officers of a corporation to so manage its affairs as to result to their private and personal advantage, that it is within the common knowledge of the great body of the people of this country. They must use every honorable means to enhance the general interest of the corporation for the special advantage of the stockholders and creditors. They are universally held to the highest measure of duty, and the most scrupulous good faith in their transactions with the business of the corporation. So rigid is the rule that no one acting in the capacity of a trustee can derive any benefit from the care, control, management, or investment of trust funds, that it is applied by all

courts without exception, and without any relaxation whatever."

And the reason for this rule is so well understood that it will suffice to refer to the following brief excerpt from a New Hampshire case, *tempore Parker, C. J.*:

"It is rarely the case that fraudulent sales of property can be shown by direct testimony. Pretended transfers of property are always made with the forms of a real sale, and evidence is always ready to show a due execution of bills of sale, and a delivery of the property. This evidence it is necessary to rebut, and it can only be done by showing various circumstances in the control and management of such property, and the situation and means of the parties; their previous dealings with and knowledge of each other; and, in certain cases, the dealings of the vendor with others as to other property, at or about the same time, even without the knowledge of the vendee."

Blake vs. White, 13 N. H., 267, 271.

And as Mr. Justice Bradley said:

"It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law."

Graffam vs. Burgess, 117 U. S., 180, 186.

Hence, the liberality of the rules of evidence:

“To establish fraud, it is not necessary to prove it by direct and positive evidence. Circumstantial evidence is not only sufficient, but in most cases it is the only proof that can be adduced.”

Bradley, J. *Rea vs. Missouri*, 17 Wall., 543.

The authorities fully recognize the value of the probabilities in a cause; and as a consequence, the modern test of relevancy is liberality itself, particularly in causes depending upon circumstantial evidence.

“As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances, the more correct their judgment is likely to be. The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inference it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth. The modern tendency, both of legislation and of the decisions of the courts, is to give as wide a scope as possible to the investigation of facts.

Courts of error are especially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused."

Holmes vs. Goldsmith, 147 U. S., 150, 164.

Remarking upon the relativity of facts, Greenleaf observes:

"The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and, in its turn, becomes the prolific parent of others; and each, during its existence, has its inseparable attributes and kindred facts, materially affecting its character, and essential to be known in order to a right understanding of its nature."

1 *Greenleaf, Evidence*, 16th Ed., Sec. 108.

Speaking of moral coincidences, a learned Court said:

"Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry, or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other; and circumstances altogether inconclusive

if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof."

Continental Ins. Co. vs. Ins. Co. of Penn., 51 Fed., 884, 887.

Speaking of antecedent probabilities, the law upon the subject is thus summed up by the Supreme Court of Indiana:

"It is a rule of elementary logic, as well as of rudimentary law, that evidence which tends to establish facts rendering it antecedently probable that a given event will occur, is of material relevancy and strong probative force."

State vs. Marvin, 95 Ind., 465; and see, also *Rugg vs. Rohrbach*, 110 Ill. App., 532.

And these views are supported by our own courts:

"The tendency of modern decisions is to admit any evidence which may have a tendency to illustrate or throw any light on the transaction in controversy, or give any weight in determining the issue, leaving the strength of such tendency or the amount of such weight to be determined by the jury; and in determining the relevancy of evidence that may be offered upon an issue of fact much depends upon the nature of the issue to sustain which or against which it is offered, and a wide discretion is left to the trial judge in determining

whether it is admissible or not. Mr. Thayer, in the introduction to his '*Cases on Evidence*' says: 'No precise or universal test of relevancy is furnished by the law. The question must be determined in each case according to the teachings of reason and judicial experience'; and Mr. Stephen in his '*Digest of the Law of Evidence*,' says (Chapter 1): 'The word relevant means that any two facts to which it is applied are so related to each other that, according to the common course of events, the one, either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other.' . . . Probability is an element which addresses itself to the reason, and is frequently invoked in matters of human conduct and experience for determining the existence or non-existence of a fact. In civil cases, a jury is authorized to determine an issue of fact as its probability or improbability may appear to them from the evidence before them. Hence, any evidence tending to show either of these conditions is relevant to the issue to be determined by them. 'If the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury.' "

Moody vs. Pierano, 4 Cal. App., 411, 418, 420.

The Right to Draw Inferences:

An inference is a conclusion drawn of the existence of one fact from others proved.

16 *Ency. Law*, 2nd Ed., 317.

It is thus described in the California Code:

C. C. P., Sec. 1958, 1960.

That ultimate facts may be determined by inferences, is thoroughly well settled.

Gates vs. Hughes, 44 Wisc., 336;

Blanton vs. Dold, 109 Mo., 64, 75;

Supreme Tent vs. King, 142 Fed., 678, 681;

Shafter vs. Evans, 53 Cal., 32;

Chidesfer vs. Cons. Ditch Co., 59 Id., 197,
201-2;

People vs. Walden, 51 Id., 588;

Stone vs. Mg. Co., 52 Id., 315;

People vs. Carillo, 54 Id., 64.

In criminal causes, inferential evidence is constantly resorted to, even to establish the *corpus delicti*; and in all classes of civil causes, especially in cases of fraud, its utility and necessity have been frequently recognized. Thus, in a familiar California case, in the course of an opinion holding that subsequent facts may be utilized to establish an antecedent fraud, the Court said:

"The proofs in cases of fraud are usually circumstantial: frauds are a species of the *crimen falsi*, which, like larceny, are not done openly. They are usually shown as inferences from facts established, rather than as facts expressly proven."

Butler vs. Collins, 12 Cal., 457, 464.

"It is well settled that if the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury. It would be a narrow rule, and not conducive to the ends of justice, to exclude it on the ground that it did not afford full proof of the non-existence of the disputed fact. Besides presumptive evidence proceeds on the theory that the jury can infer the existence of a fact from another fact that is proved, and most usually accompanies it. Many of the affairs of human life are determined in courts of justice in this way, and experience has proved that juries, under the direction of a wise judge, do not often err in the reasoning which leads them to a proper conclusion on such evidence. And if they should happen to reach a wrong conclusion, the court has in its own hands the mode and measure of redress."

Davis, J. *Home Ins. Co. vs. Weide*, 11 Wall., 440.

"Inferences from circumstantial facts may frequently amount to full proof of a given theory, and may even be strong enough to overcome the force and effect of direct testimony to the contrary."

Clifford, J. *The Wenona*, 19 Wall., 58.

"As has been frequently said, great latitude is

allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be."

Shiras, J. *Holmes vs. Goldsmith*, 147 U. S., 164.

"Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof."

Clifford, J. *Castle vs. Bullard*, 23 How., 187.

"Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances, as the means of ascertaining the truth."

Clifford, J. *Castle vs. Bullard*, 23 How., 187.

Upon the oral argument, it was conceded to be correct that the Court may utilize inferences for the pur-

pose of determining what was in the minds of the parties during the transaction in question, but it was contended that the presumption of good faith prevailed over that of fraud. We respectfully insist, however, in view of the evidence, both oral and documentary which has been presented in this case, that it would be fallacy to attribute an artificial probative force to any presumption. The truth of the matter is that a presumption operates only in the absence of evidence: where there is evidence before the Court, presumptions have no place; and to quote the language of the Circuit Court of Appeals for the Ninth Circuit:

“Where there is evidence, . . . the case should be determined upon the evidence, and not upon a presumption that arises only in the absence of all evidence.”

Los Angeles Traction Co. vs. Conneally, 136 Fed., 104, 108;

and see, further, in illustration of this remark:

4 *Wigmore on Evidence*, Sec. 2491;

Owsley vs. Owsley, 77 S. W. (Ky.), 394, 397;

Hill vs. Chambers, 30 Mich., 422, 428-9;

Whiton vs. Snyder, 88 N. Y., 299;

Cummings vs. O'Brien, 122 Cal., 204, 206.

Mode of Drawing Inferences:

Not only, then, should a judge infer facts from the

evidence produced, but, in drawing his inferences, he is not hide-bound, and especially where the indirect processes of fraud are concerned, he may receive all the light which may be shed upon the evidence by his common sense and knowledge and experience of men, motives, passions, propensities, and selfishness.

“In deciding disputes between litigant parties, where witnesses are naturally apt to state facts strongly in favor of their respective principals, the jury well may, and, in fact, must use their own knowledge and experience in the ordinary affairs of life to enable them to see where is the truth.”

Shiras, J. *Jacksonville, etc., R. Co. vs. Hooper*,
160 U. S., 530.

“In this (the difficulty of fathoming men’s motives) the Court can only rely on the judgment and experience of juries.”

Johnson, J. *Patapsco Ins. Co. vs. Coulter*, 3
Pet., 238.

This right of a jury to weigh evidence and dissect motives in the light of their knowledge and experience in life and of the usual springs of human action, is fully recognized in a well considered case in the Supreme Court. In that case, the lower court told the jury:

“It is your duty to come to a conclusion upon all those facts, *and the effect of all those facts*,

the same as you would conscientiously come to a conclusion upon any other set of facts that would come before you in life. There is no technical rule: there is no limitation in courts of justice that prevent you from applying to them (the facts and circumstances in evidence) just the same rules of good common sense, subject, always, of course, to a conscientious exercise of that common sense, that you would apply to any other subject that came under your consideration and that demanded your judgment."

These instructions were attacked; and in approving them, the Court, through Mr. Justice Brown, said:

"There was no error in these instructions. One of the main objects of a jury trial is to secure to parties the judgment of twelve men of average intelligence, who will bring to bear upon the consideration of the case the sound common sense which is supposed to characterize their ordinary daily transactions. If cases were to be decided alone by the application of technical rules of law and evidence, it could better be done by men who are learned in the law and who have made it the study of their lives; and while it is entirely true that the jury are bound to receive the law from the Court, and to be guided by its instructions, it by no means follows that they are to abdicate their common sense, or to adopt any different processes of reasoning from those which guide them in the most important matters which concern themselves. Their sound common sense brought to

bear upon the consideration of testimony, and in obedience to the rules laid down by the Court, is the most valuable feature of the jury system, and has done more to preserve its popularity than any apprehension that a bench of judges will wilfully misuse their power. To construe these instructions as authorizing the jury to depart from the rules of evidence and to decide the case upon abstract notions of their own, or from facts gathered outside of the testimony, is hypercritical. They are simply told to come to a conclusion upon the facts that had been proven, and to apply to those facts the same rules of good sense that they would apply to any other subject that came under their consideration and demanded their judgment. In these remarks the Court gave a just and accurate definition of their functions. It certainly would have been error to have told them to apply to the facts proven any other rules than those which their good common sense dictated, or to set up any other standard of judgment than that which influenced them in the ordinary business of life."

Dunlop vs. U. S., 165 U. S., 486, 499-500.

"The natural instinct which leads men in their sober senses to avoid injury and preserve life, is an element of evidence. In all questions touching the conduct of men, motives, feeling and natural instincts are allowed to have their weight, and to constitute evidence for the consideration of courts and juries."

Allen vs. Willard, 57 Pa. St., 374, 380.

"It was the province of the jury to weigh the testimony of the attorneys as to the value of the services by reference to their nature, the time occupied in their performance and other attendant circumstances, and by applying to it their own experience and knowledge of the character of such services. . . . Other persons besides professional men have knowledge of the value of professional services; and while great weight should always be given to the opinions of those familiar with the subject, they are not to be blindly received, but are to be intelligently examined by the jury in the light of their own general knowledge; they should control only as they are known to be reasonable."

Head vs. Hargrave, 105 U. S., 45, 49, 50.

"It is proper for the jury to apply to the facts proved, their general knowledge as intelligent business men. They must test the truth and weight of evidence, and what it proves, by their knowledge and judgment derived from experience, observation and reflection."

Kitzinger vs. Sanborn, 70 Ill., 146, 149.

The following is the entire opinion:

"Bleckley, C. J. This case presents no legal question, simply a question of fact; and we dispose of it in this brief summary as a complete opinion. The credit of witnesses is for the jury. If the jury believe the plaintiff's witnesses, the

verdict was not without evidence to support it. In construing and applying testimony, reasonable inferences and deductions may be made, and conclusions may be reached that lie quite beyond the mere letter of the evidence. Judgment affirmed."

White vs. Hammond, 4 S. E. (Ga.), 102.

"The defendant also excepted to the statement in the 7th instruction as given, that the jury, in determining the questions of fact upon the evidence before them, might apply their own practical knowledge upon such subjects. There was no error in this. It did not permit them to rely upon facts not in evidence, or to decide the matters at issue upon their own private knowledge, but simply as men of affairs to judge of the questions of fact in issue in the light of their own experience."

Johnson vs. Hillstrom, 33 N. W. (Minn.), 547, 548.

"It is certainly competent for the jury to use their knowledge of human nature and of the customs of society in their efforts to interpret conduct, and judge of its indications."

O'Neill vs. State, 11 S. E. (Ga.), 856, 858.

In this case the Court among other things instructed the jury as follows:

"You may also in considering whom you will

or will not believe take into account your experience and relations among men.”

In overruling the objection of appellant to this instruction, the Court said:

“Juries should be and as a rule are selected because of their extensive experience among men. The school of experience which men attend in their varied relations among men imparts a keenness of mental vision which enables them the more readily to see the motives and to judge of the selfish or unselfish interests of men. This education, be it much or little, is a part of the juror, and should not, if possible, be laid aside in passing upon the inducements which may surround a witness to speak falsely. It is this education which to a great extent enables a juror to discover in the faltering manner or the downcast eye whether the statement of the witness was made in modesty or in guilty falsehood. The value of experience is not to be given up when the man becomes a juror, and is required to apply the tests of credit to the heart and mind of the witness, but whatever qualification that experience gives should be employed to the end that the whole truth may be known and acted upon.”

Jenney Electric Company vs. Brannan, 41 N. E. (Ind)., 448, 450, 451.

“It would result in the confusion of the mind of a juror if told that he must not allow his judgment as a man to be mixed up with his judgment

as a juror. The duties of a juror in no manner transform him. It is upon the theory that he continues to be a man, though a juror, that he is rendered capable of construing evidence."

People vs. Ammerman, 118 Cal., 23, 30.

In this case the Supreme Court quoted with approval the following passage from the opinion of Mr. Justice Field in *Head vs. Hargrave*, 105 U. S., 45:

"So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed, and it was only in that way that they could arrive at a just conclusion. While they cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently they must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry."

And in this same opinion, the Supreme Court of Kansas quoted with approval the following language of Chief Justice Shaw in *Patterson vs. Boston*, 20 Pick., 166:

"Juries would be very little fit for the high and responsible office to which they are called, especially to make an appraisal, if they might not avail themselves of those powers of their minds

when they are most necessary to the performance of their duties."

And also the following language of Chief Justice Shaw from *Murdock vs. Sumner*, 22 Pick., 158:

"The jury very properly exercise their own judgment, and apply their own knowledge and experience, in regard to the general subject of inquiry."

Chicago, etc., Railway vs. Drake, 26 Pac. (Kansas), 1039.

And finally, it is observed by the Supreme Court of New York:

"The quite modern solemn saying that fraud cannot be presumed but must be proved is made much of. It has done much duty in its time to prevent judgments of fraud, without its being always perceived that it is a rather solemn absurdity. Of course fraud must be proved and cannot be presumed, but so must the price of a cow or pig, and it cannot be presumed. A solemn and wise statement of the former is quite as absurd as a like statement of the latter. The rule is that no fact may be presumed but must be proved, and fraud is founded on sufficient evidence and the deductions therefrom the same as another fact."

Tyrrell vs. City of New York, 94 N. Y. S., 951, 953.

From the bearing and significance of these rules,—

and these rules are the outgrowth of judicial experience,—it must be plain that it would be hopeless to expect any display or open avowal of ulterior purposes by parties seeking unconscionable advantages over others: on the contrary, their constant effort and aim would be, if not fully to cover up, at least to mask, their real intentions.

With these rules in mind, let us look at the situation presented on March 25-26, 1908.

A. The Utility of Probabilities, Antecedent and Subsequent.

Mr. Herbert Spencer, the great thinker who so recently departed, has told us something of the relativity of knowledge: but experience teaches that there is a relativity of facts as well. An isolated fact can scarcely be imagined: for facts are related like men, both antecedently and subsequently; and there is in all human situations, a train or sequence in the facts that make them up. While every transaction creates new relations, yet it is itself the birth or product of antecedent circumstances: it is this consideration which assists us to see in what goes before, the preparation or seed of what is to follow after; and hence the utility of considering circumstances, both antecedent, contemporaneous and subsequent, which make probable a given or claimed consequence.

Views of Greenleaf:

"The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and, in its turn, becomes the prolific parent of others; and each, during its existence, has its inseparable attributes and kindred facts, materially affecting its character, and essential to be known in order to a right understanding of its nature."

1 *Greenleaf, Evidence*, 16th Ed., Sec. 108.

Views of Harrison, J.:

"Probability is an element which addresses itself to the reason, and is frequently invoked in matters of human conduct and experience for determining the existence or non-existence of a fact. In civil cases, a jury is authorized to determine an issue of fact as its probability or improbability may appear to them from the evidence before them. Hence, any evidence tending to show either of these conditions is relevant to the issue to be determined by them. 'If the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury.'"

Moody vs. Pierano, 4 Cal. App., 411, 418, 420.

In other words, the transaction in question here should be considered in its actual setting at the time of its occurrence.

B. *The Sequence of Historical Events up to March 25-26, 1908.*

We have:

The incorporation of the various cement companies.

The Howard Sales Agency Companies, and their intimate relations with the cement companies.

The organization of the N. W. Co.

The intimate relations of Howard, Evans and Dingee with the launching of the N. W. Co.

The bond issue of the N. W. Co. and its purpose.

The unlawful diversion by Dingee of funds of the N. W. Co. derived from the sale of its bonds.

The cessation of operations at Kendall.

The collapse and failure of the N. W. Co. to develop its enterprise.

Evans' unanswered letters to Dingee.

Evans' consequent anxiety and dissatisfaction.

The Wenzelburger investigation.

The disclosure of Dingee's wrongdoing.

Evans' consequent trepidation and fear for his money, and his threats. Indeed, upon the Oral Argument, it was conceded that Evans was very much agitated, dissatisfied and complaining.

Communication of Evans' state of mind by Howard to Dingee, and the latter's consequent anxiety to get Evans off his back.

Evans' significant subsequent conduct: his visit to San Francisco as soon as he could, and his conferences with Smith and with Howard.

In other words, we have here the old story of Invest-

ment; Failure of the Enterprise to make good: Investigation; Disclosure of Wrongdoing by a Fiduciary; anxiety of that Fiduciary; and Determination to get back the money invested. Here, we have precisely the conditions fit for generating a second breach of trust by that fiduciary, in order to get the malcontent off his back.

And through all this, the Standard stood apart, wholly independent of any connection with the N. W. Co.: and it never was brought into the mess until the fiduciary, to save himself, sacrificed it to the malcontent N. W. bondholder.

C. The Position and Assets of the N. W. Co. on March 25-26, 1908.

This matter has already been discussed. It is enough now to say that the enterprise was a failure: that all that was done up to March 25-26, 1908, was to organize the Company, declare a bond issue, sell bonds, divert proceeds, and make no progress at Kendall. And all of this was thoroughly well known to all concerned. The total amount expended at Kendall was a bagatelle: even the machinery and tools were shipped away; and all that was left behind was a hole in the ground in which to bury the Company and its evil memories of failure, spoliation and embezzlement.

And Evans can not dispute these wretched conditions: he does not dispute them; and in his deposition,

after confessing to suspicions in January, 1908, he adds:

“Of course, I was under the impression that \$700,000 had actually been put up on the sale of bonds, and as I knew that practically only a little more than \$20,000 had been actually expended, there should have been, of course, a lot of money left.”

Record, Vol. I, p. 178.

And all the while, he knew the purpose of the N. W. Co. bond issue.

D. *Relations between Evans and Howard.*

These relations were of the closest and most intimate character: this record everywhere reveals a complete community of interest, feeling and sympathy between them.

Evans and Howard.

1. Acquainted a good many years: Record, Vol. I, p. 133.
2. Relations friendly: Record, Vol. I, p. 177.
3. Evans' firm was authorized agent for B. G. Co. with whom Howard was very intimate: Record, Vol. I, p. 124, 126.
4. Evans' firm held shares in the W. F. Co.: Record, Vol. I, p. 124.

Shareholders for \$18,100: Record, Vol. I, p. 126.

Howard was executive head of W. F. Co.: Record, Vol. I, p. 126.

5. Evans' firm was agent for W. F. Co.: Record, Vol. I, p. 133, 212, 214.
6. Evans' firm never gave up its holdings in the W. F. Co.: Record, Vol. I, p. 127.
7. The W. F. Co. acted for Evans in the Wenzelburger Investigation: Record, Vol. I, p. 186.
8. Evans had "absolute confidence" in the W. F. Co.: Record, Vol. I, p. 224.
9. Evans and Howard were jointly interested: Record, Vol. I, p. 212; Record, Vol. II, p. 402-3.
10. They were jointly interested and closely associated: Record, Vol. I, p. 212, 181.
11. They were so chummy that onlookers described them as having "hobnobbed" together: Record, Vol. II, p. 460, 498.
And according to the Century Dictionary, "hobnob" conveys the idea of intimate familiarity.
12. Evans showed courtesies to Howard: Record, Vol. II, p. 373.
13. Evans' disbursements (\$2664.76) looked after by Howard: So, early disbursements.
14. Evans' "efforts" for Howard's "associates." He regarded Dingee and Bachman as Howard's associates: Record, Vol. II, p. 511.

He was familiar with their doings: Record, Vol. II, p. 394.

He wilfully misleads for them: Record, Vol. II, p. 400, 401.

And he keeps it up: Record, Vol. II, p. 413.

His secretiveness: Record, Vol. II, p. 413, 461.

15. Evans' solicitude for Howard:

In re S. F. disaster: Record, Vol. II, p. 353.

In re Howard's convenience in traveling: Record, Vol. II, p. 375.

In re consultation with Howard's attorney: Record, Vol. II, p. 389.

In re Howard's 80 acres: Record, Vol. II, p. 398.

16. Evans reposed such confidence in Howard that he put himself into Howard's hands: Record, Vol. II, p. 476.

17. Evans' absurd attempt to screen Howard by trying to deny Howard's connection with the floating of the N. W. Co.: Record, Vol. I, p. 127-8.

And this, if you please, from the author of this correspondence and other evidence showing his knowledge of Howard's connection with the enterprise from the beginning.

18. Evans consulted Howard, not Smith, as to the interest on the so-called Standard notes, and sent the notes to Howard for collection, not to Smith; and he tells Howard to select some

solicitor, overlooking Smith: Record, Vol. I, p. 194.

19. Evans' familiarity with Howard's "trials and tribulations": Record, Vol. I, p. 170.

And this spirit by Evans toward Howard was fully reciprocated by Howard toward Evans:

Howard and Evans.

20. Confidential letters between them.
Correspondence passim.
Sample: Record, Vol. II, p. 361, 359-360, 383, 472.
21. Howard calls Evans "Ernest": Record, Vol. II, p. 505, 506.
22. Howard extends his affection to Percy Evans also: Record, Vol. II, p. 508.
Calls him "Percy": Record, Vol. II, p. 508, 545, 547.
23. Howard stops over night at "Ernest's" house.
24. Howard pays interest for Evans: Record, Vol. II, p. 503-4.
25. Howard and Evans agree to post each other as far as they consistently can: Record, Vol. II, p. 368-9.
And Howard kept himself posted.
Evans knew all that Howard knew.
26. Howard discriminates Evans' shares for him: Record, Vol. II, p. 498-9.
27. Howard and Evans agreed that Howard, Dingee and Bachman were under "obligations" to Evans: Record, Vol. II, p. 385, 393, 504.

28. Howard's benevolent purposes as to Evans:
N. W. Co. promotion profits: Record, Vol.
II, p. 467.

N. W. Co. promotion profits: Record, Vol.
II, p. 488.

29. Howard's "efforts" for Evans:

Would do his best to get for Evans out of
N. W. Co. promotion profits \$50,000 ad-
ditional: Howard, Record, Vol. II, p. 480.

Wanted Dingee and Bachman to recognize
Evans' work: Howard, Record, Vol. II,
p. 488.

Would conceal Evans' extra bonus from
Company: Record, Vol. II, p. 497.

E. Summary as to Relations between Evans and Howard.

This rapid, but not exhaustive, review of this record establishes the complete understanding and intimate relations between Evans and Howard: it shows the sympathy and community of interest that obtained between them; and it evinces the constant transmission of information from one to the other. The entire relation might well be summed up in the phrase that their interests were identical: Howard looked upon Evans' interest as his own: Howard would care for Evans' interests as his own; and Evans concurred in that declaration and position (Record, Vol. II, p. 490-1; 496).

F. *The Relations between Howard and Dingee and Bachman.*

But let us advance another step in this analysis of the situation on March 25-26, 1908. Having seen the relations between Evans and Howard, we now inquire into the relations between Howard and Dingee and Bachman; and here, again, we are confronted with relations of the most marked intimacy—precisely such relations as were peculiarly appropriate to permit the sequel complained of.

1. Howard knew Dingee quite well and for some time prior to 1908: since 1881.
2. Howard and Dingee often lunched together: Record, Vol. II, p. 405, 519.
For 2 hours at a time: Record, Vol. II, p. 487.
3. Howard, Dingee and Bachman would also lunch together: Record, Vol. II, p. 488.
4. Howard and Dingee were in frequent conference: Record, Vol. I, p. 137, 141, 143-4, 148, 151, 154, 156-8, 169-170, 171.
5. Howard was familiar with Dingee's cement plans: Record, Vol. I, p. 128.
6. Howard acted for and represented Dingee in the north: Record, Vol. I, p. 128-132.
Howard was Dingee's "valuable asset."
And Dingee was "his nibs."
7. Howard and Dingee were interested in other enterprises aside from the Santa Cruz Co.,

the Standard Co., and the N. W. Co., namely:

Western Calcium Co.

B. B. & B. C. Ry.

Helped to place Santa Cruz bonds.

Eureka Slate Co.

8. Howard obtained railway privileges through Dingee: Record, Vol. II, p. 372-5.
9. Howard's personality was important in Dingee's eyes, Dingee being anxious to have and retain him as sales agent:
Letter of Feb. 17, 1908: Record, Vol. III, p. 725.
10. Howard entertained a high opinion of Bachman in the cement business: Record, Vol. II, p. 363.
11. Howard advised Bachman of his doings north, and of Evans' "latest news": Record, Vol. II, p. 383.
12. Howard transacted all of his cement business with Dingee or Bachman.
13. Howard was in close and confidential touch with Dingee as to B. B. & B. C. Ry. affairs: Record, Vol. II, p. 469,500.

Howard helped Dingee to acquire control. He knew that Dingee "will control and influence two-thirds" of the stock: Record, Vol. II, p. 442.

He went into the road on Dingee's stock. And note his subordination to Dingee:

Letter of Jan. 28, 1907.

14. Howard was Dingee's "Statesman."

Other Pet Names:

"Valuable Asset."

"His Nibs."

"Grasshopper."

"Crowned Heads."

15. Howard, Dingee and Bachman were so close that Evans regarded them as "associates": Record, Vol. II, p. 511.
16. Howard acknowledged that he was "associated" with Dingee: Record, Vol. II, p. 386.
17. Howard acknowledged that his and Evans' interests were allied with the Dingee combination: Record, Vol. II, p. 409, 453, 459.
18. Howard's intimacy with Dingee emphasized: Calls Dingee's attention to proposition of business adversary: Record, Vol. II, p. 436-7.
19. Howard's familiarity with Dingee's movements:
 When Dingee would leave New York:
 Record, Vol. II, p. 384.
 When Dingee was due in San Francisco:
 Record, Vol. II, p. 393, 397.
20. Howard's sense of responsibility as to land acquisition: Record, Vol. II, p. 462.
21. Howard and Dingee discussed the financial scheme of the N. W. Co.: Record, Vol. I, p. 154-5: Vol. II, p. 488, 512.
 As far back as 1906.
 So with Bachman: Record, Vol. II, p. 383-386.

22. Howard's compensation for his activity in assisting to launch the N. W. Co. was to be shares given him by Dingee: Record, Vol. I, p. 132-3.
23. Howard, Bachman and Dingee were to share "alike" in the promotion profits of the N. W. Co.: Record, Vol. II, p. 385.
24. Howard's intimacy and influence with Dingee and Bachman illustrated by the appointment of C. W. Howard as Washington agent of the N. W. Co.

Wenzelburger's Report: Meeting of Sept. 26, 1906.

Not a syllable about Howard.

But we know what influence was at work:
Record, Vol. II, p. 447.

Another Illustration:

Banking: Record, Vol. III, p. 861-2: 857-8.

25. The shares that Howard got from Dingee were promotion shares of the N. W. Co.: Record, Vol. II, p. 543.
26. Howard felt that he, Dingee and Bachman were under "obligations" to Evans: Record, Vol. II, p. 385, 393, 504.
27. Howard communicated to Dingee and Bachman his benevolent intentions as to Evans: Record, Vol. I, p. 141.
28. Howard obtains "remuneration" for Evans from Dingee: Record, Vol. II, p. 520, 522.
29. Howard knew all about Evans' unanswered letters to Dingee: Record, Vol. I, p. 163-4.

30. Howard advised Dingee of the Evans' criminal liability letter, even sending it out to S. F. from N. Y.
31. Howard was selected by the malcontent bondholders as the man to interview Dingee in March, 1908: Record, *passim*.
32. Howard or his companions advanced Dingee money prior to May, 1908, and loaned him money as late as October, 1908: the advances began on March 28, 1908, immediately after the agreement of March 25/26, 1908.
33. Dingee gave Howard a power of attorney in re Panama Canal Cement Contract, on May 1, 1908—the date of the notes sued on here.

G. Summary as to Relations between Howard and Dingee.

Can any reasonable person, reading this record in the light of his experience of life and of human nature, doubt for a moment the intimacy between Howard and Dingee? And he was the exclusive selling agent for the output of Dingee's cement corporations: Dingee was under financial and business obligations to him: he had warned Dingee of the temper of the malcontent bondholders: and when he came to Dingee as agent for those bondholders, he had the special and personal motive to further the issuance of the notes arising from his recognition of that responsibility which he refers to in his letters. Taking all their relations together, was not Howard the man of all men

to dispatch upon that mission to Dingee designed to enable the bondholders to "get rid" of the bonds?

H. Relations between Dingee and the Standard Corporation.

We have seen how intimate were the relations between Evans and Howard: we have seen how intimate were the relations between Howard and Dingee: what, then, were the relations between Dingee and the Standard Corporation?

There is but one answer from all sides of the case, and that is the "unquestioned" dominance and control of Dingee over that corporation.

In view of the unquestioned and conceded hegemony of Dingee over the Standard Corporation, it may not be amiss to direct attention to the way in which courts of the highest authority regard a man in that position. Thus, it is observed by Judge Sanborn, one of the ablest of our Federal Judges:

"The question which this case presents is: May the holder of the majority of the stock of a corporation make a sale to himself, unassailable in equity, of all the property of the corporation for its fair value, when he knows that the value is only five-sevenths of the amount which the corporation can obtain for it. It is not material to the determination of this issue whether the notice of the stockholders' meeting specified, or failed to state, that the question of the confirmation of the sale to Southworth would be there considered, or

whether or not the other proceedings of the defendants complied with the requirements of the law; and for the purposes of this decision it will be conceded, but it is not decided, that all the proceedings of the parties and of the corporation were in strict accordance with the forms of law. The objection to this sale lies deeper. It is that it was violative of the duty of a fiduciary.

"A corporation holds its property in trust for its stockholders. The stockholders have a joint interest in the same property and in the same title. Community of interest in a common property or title imposes a community of duty and a mutual obligation to do nothing to impair either. It creates such a fiducial relation as makes it inequitable for any of those who thus share in the common property to do anything to or with it for their own profit, to the detriment of others, who have the same rights. *Jackson vs. Ludeling*, 21 Wall., 616, 622; 22 L. Ed., 492; *Jones vs. Missouri Edison Electric Co.*, 144 Fed., 765, 771; 75 C. C. A., 631, 637; *Booker vs. Crocker*, 132 Fed., 7, 8, 65 C. C. A., 627, 628.

"The holder of the majority of the stock of a corporation has the power, by the election of bid-dable directors and by the vote of his stock, to do everything that the corporation can do. His power to control and direct the action of the corporation places him in its shoes, and constitutes him the actual, if not the technical, trustee for the holders of the minority of the stock. He draws to himself and uses all the powers of the corporation. In effect he holds an irrevocable power of attorney

from the minority stockholders to manage and to sell the property of the corporation, for himself and for them. Times, places, and notices of meetings of the directors and of meetings of stockholders become of secondary importance, because the presence, the vote, and the protest of holders of the minority of the stock are unavailing against the will of the holder of the majority. They can act and contract regarding the corporate property, they can preserve and protect their interests in it, only through him and through the courts.

“This devolution of unlimited power imposes on a single holder of the majority of the stock a correlative duty, the duty of a fiduciary or agent, to the holders of the minority of the stock, who can act only through him, the duty to exercise good faith, care, and diligence to make the property of the corporation produce the largest possible amount, to protect the interests of the holders of the minority of the stock, and to secure and pay over to them their just proportion of the income and of the proceeds of the corporate property. Any sale of the property of the corporation by him to himself for less than he could obtain for it from another, or any other act in his interest to the detriment of the holders of the minority of the stock, becomes a breach of duty and of trust, renders the sale or act voidable at the election of the minority stockholders, and invokes plenary relief from a court of chancery.”

Wheeler vs. Building Co., 159 Fed. Rep., 391,
393-4.

And apropos of Judge Sanborn's views, it may be said that the general precautions taken by the legislature in framing its scheme of corporate regulation, presupposes a more or less general distribution of stock and corporate control, and an equalization of influence in the corporate management: but when one man holds the corporation and its fortunes in the hollow of his hand, all that is changed and goes for naught, and we are then confronted with all the evils of boss rule. This may well be illustrated by a proceeding which involved Addicks, formerly a political boss in the State of New Jersey. Addicks undertook to treat his corporations much as Dingee treated the corporations under his control: the result was that he was brought before a Chancellor; and the very full understanding and instruction of the Chancellor will be found reported in *Pepper vs. Addicks*, 153 Fed. Rep., 383. It will be remembered that Mr. McGary, who was one of Dingee's puppets upon the directorate of the Standard Corporation, testified that in the transaction of the corporate business he carried out the views or policies of Dingee, and acted at Dingee's dictation, and that this subordination of himself to Dingee was true of the so-called special meeting of May 5, 1908. Bearing this testimony in mind, we find that in *Pepper vs. Addicks*, the Court held that where the defendant, an officer and director of a corporation, absolutely dominates its Board of Directors and induced such Board to authorize the purchase of worth-

less bonds of other corporations in which he was interested, by which he was enabled to make a large individual profit, he was liable to account to the corporation's receiver for the profit so made; and the Court put considerable stress upon the fact that the defendant did dominate the directorate of the corporation; and in referring to that matter on page 397 of the report the Court observes that "He elected his own friends and associates as directors and officers, and they did whatever he asked them to do,"—a passage of which the testimony of Mr. McGary in the cause at bar is a sheer echo. And on page 403 of the report, the Court observes:

"As it seems to me, the evidence proves overwhelmingly that the defendant was the absolute master in fact of the corporation, that his personality was dominant in all its affairs of every kind, that he dictated the personnel of its officers without contest or contradiction, and that the board of directors and the other officers were content merely to register his will. If he had owned the entire capital stock of the company—save the necessary qualifying shares—he could not have controlled it more completely. In short, the defendant and the Delaware Company were essentially identical, and the corporate machinery was merely used for the purpose of executing his plans under the guise of carrying out a formal corporate determination."

And later on in the same opinion, after referring to the authorities, the learned Judge said:

“As it seems to me, the defendant is in the position condemned by these authorities. He was an officer of the Delaware Company, and used his position as president and director to advance his own interests at the expense of the corporation. Of course, if he had put his hand into the treasury of the Delaware Company and had physically withdrawn for his own profit the money which the Company had lost, no one would question his liability. Neither would it be questioned, if he had conspired with a majority of the board to do the acts and pass the resolutions that have been done and passed, whereby the same result should be accomplished as by the coarser method of corporeal abstraction. And I see no reason why his liability should be doubted because the means actually adopted were different in kind, but were equally efficacious to transfer the property of the corporation to his personal use and profit. His control of the board was as complete as if they and he had been in collusion to accomplish a common object; and, with this uncontested power in his hands, he was the more bound to the utmost good faith and fair dealing. As has been shown, I think, he was absolutely unchecked by his fellow officers and directors. They looked to him, and to him alone, for information and advice. What he gave them was accepted without the slightest question or suspicion, and his wishes were carried into effect promptly and without change. No one can read the testimony without being convinced that real discussion in the board, or the exercise of individual judgment, was unknown. The directors and

officers were either careless or ignorant to an almost incredible degree, and were apparently content to draw their satisfactory salaries and clothe his requests or suggestions in the formal garb of corporate action."

Pepper vs. Addicks, 153 Fed., 383, 397, 403, 406-7.

I. *The Position of Dingee in March, 1908.*

Bearing in mind, then, the situation and surroundings of the N. W. Co.: bearing in mind its failure to develop its enterprise, and the reasons therefor, and consequences thereof: bearing in mind the relations between Evans and Howard, and Howard and Dingee, and Dingee and the Standard Corporation,—what was Dingee's actual situation in March, 1908?

1. A Fiduciary. He was an officer of the N. W. Co., of the Santa Cruz Co., and of the Standard Co.: he was their fiduciary; and his duties and obligations as such were thoroughly well defined by law; and his position as such fiduciary gave him no more right, merely because he possessed control, to obligate the Standard to meet consequences flowing from his own wrong doing in the affairs of the N. W. Co., than it gave him *sua sponte* to pledge the B. B. & B. C. Ry. stock to the American Bridge Co. for a debt of the Santa Cruz Co., or to ship the tools to Santa Cruz, or

to divert and misappropriate the funds of the N. W. Co.

Civil Code, Sec. 2228, *et seq.*, 2322 Subd. 3;

Stevens vs. Gall, 179 Fed., 938;

Trice vs. Comstock, 121 Fed., 620, 622-3, 626-7;

Giebler Mfg. Co. vs. Krannenberg, 92 N. Y. S., 843;

Worthington vs. Worthington, 91 Id., 443;

Baker vs. Ducker, 79 Cal., 365.

Dingee was in control of these corporations: he was their fiduciary in the highest sense; and in any transaction which involved these Howard bondholders, the N. W. Co., the Standard Corporation, and consequences flowing from Dingee's unlawful diversion of proceeds of the N. W. Co. bond issue, and from his failure to establish the heralded plant at Kendall, upon their faith in the establishment of which plant these bondholders had invested, Dingee acted in a double capacity,—personally and individually, and also as a fiduciary for these corporations. But if, by reason of the position taken by the Howard bondholders, plus Evans' references to the criminal law, plus his own desperate financial condition, plus his own consciousness of corporate wrong doing, plus his control over the Standard, he sacrificed the Standard to his personal interest, treated it as his very chattel, imposed upon it the worthless bonds of a rank and odorous failure,

and shifted to it a burden which he should have borne; and if he did this fraudulent and inequitable thing with the knowledge, connivance and participation of these Howard bondholders, who themselves had a strong financial and personal motive to urge and help him to do it,—then it would be an everlasting reproach to equity, if, when those who profited by that deal came before a chancellor to realize the fruits of the deal, the chancellor did not thrust them forth as unclean things.

2. *A Financial Wreck.*

Can there be any reasonable doubt that, in March, 1908, Dingee's financial condition was wholly desperate—that his back was against the wall?

Record, Vol. I, p. 189-190; Vol. II, p. 529-530, 540, 543-4.

And further light is thrown upon his financial condition by the testimony of Foster Young.

In 1908 Dingee "collapsed" as Howard puts it.

In other words, he was in precisely that condition of stress which breeds just such corporate abuses and breaches of trust as the Standard complains of here.

That Dingee was in control of the Standard and the Santa Cruz was unquestioned: that he had the ability to furnish the note of either company at pleasure, was also unquestioned, as Evans, Smith and Howard tell us. And Evans, therefore, thoroughly under-

stood and appreciated the contemporaneous facts of Dingee's desperate financial condition and his control over these cement companies. That Dingee was broke; that Evans and Howard knew it well; that they knew that he could not personally repurchase the bonds that Evans was so anxious to get rid of and had told them so; that they knew that he would be compelled to unload these disastrous bonds upon one of the cement companies that they knew he had in his waist-coat pocket; that this is precisely what all concerned agreed to do; that this is precisely what they actually did do:—all this, and more, arises so conspicuously from this record that the swiftest runner may read it with ease.

Indeed, if Dingee were not in control of these cement companies, this cause would not be upon hearing: it was this very control which opened the way to the appeasement of Evans' consuming anxiety to get something, somehow, in return for the money which he had put into a disastrous speculation; and Evans as well as Howard fully realized the significance of the concurrent facts of Dingee's financial straits and his corporate control.

3. *Dingee's Anxiety.*

And in addition to all this, Dingee was in a state of mental disturbance and anxiety.

The reason for this condition of things is plain. Very naturally, Dingee wanted to get Evans off his

back. He knew full well of the constant complaints that Evans was making.

He had seen Evans' letter of March 4th: he had greeted it with "a burst of profanity" (Young, Record, Vol. III, p. 722): he was fully alive to all that was passing in Evans' mind when Evans wrote of criminal liability; and that he interpreted the letter as a threat, and took it to heart, his acts and conduct, his profanity, his talk to Young and his pencil slip, make entirely clear.

And this very letter, as well as the other criminal letter of Feby. 10th, was written during the period from Jany. to March, 1908, concerning which Evans swears thus:

Record, Vol. I, p. 210-212.

Truly as one reads this, one wonders at the vagaries of the human memory, and one is reminded of the complaint made by a speaker in the introduction to one of Sir Walter Scott's novels: "No, Doctor, I have no command of my memory: it only retains what happens to hit my fancy." *Verbum Sapienti Sat Est.*

But Dingee knew his own financial condition: he knew that he had committed a corporate wrong in his management of the N. W. Co.: he knew that when he misappropriated its funds, he violated his fiduciary obligations and committed a corporate fraud: he knew of the constant complaints of Evans, squirming upon

the anxious seat, eager to get rid of these calamitous bonds, and solicitous for the return of his ducats: he knew of the unanswered inquiries of Evans; and when the suggestion of criminal liability was originated by Evans, and transmitted by Howard, it went home to his guilty consciousness. Is it any wonder that he was agitated, perturbed and upset, exhibiting his feelings in bursts of profanity?

4. *Dingee Needed Time.*

And besides, he needed time. In his then condition, he was ready to give up or give away anything to secure a year's time.

Compare, Foster Young, Record, Vol. III, p. 751.

Dingee was seeking to carry a heavy load: he was carrying the Atlantic, the Standard, the enlargement of the Santa Cruz after the disaster of 1906, the N. W. Co.; and he could not carry them all. The N. W. Co. was worse than a failure—it was a crime: the Santa Cruz was not a success, and until as late as June, 1908, as Howard tells us, its product was a failure: the financial condition of the Standard, as reflected in its trial balance, was that of a corporation burdened by debt: Dingee's finances had crumbled about him; and if ever a man needed time, Dingee did then. Time alone was his salvation, and time he was plainly determined to get.

5. *His Desire to Conciliate Howard, and Placate the Howard Bondholders.*

And besides, Dingee was desirous of conciliating Howard, who, as the exclusive sales agent of the cement corporations, held the purse strings; and who, significantly enough, loosened those purse strings within a couple of days after Dingee capitulated to Evans' emissary, Howard.

And over it all and through it all, there ran, as already pointed out, his acute personal interest to placate the complaining and threatening Howard bondholders.

Everything had gone wrong: the outlook for Dingee was gloomy, threatening and dispiriting: his horizon was clouded by financial and personal trouble; and when Evans put the finishing touch to the situation with his statement as to the criminal liability of a man who knew that he had done wrong, and who knew that the suggestion was inspired by knowledge of his wrongdoing he broke, and became, as to the Standard, the same faithless trustee that he had already been to the N. W. Co. Dingee was not only a financial wreck, but a moral one as well; and he was peculiarly susceptible to suggestions emanating from a man whose mind he knew to be filled with thoughts of criminal liability. We know of Dingee's unlawful misappropriation of the N. W. Co.'s funds: we know of his unlawful pledging of the B. B. & B. C. Ry. stock to the Am. Bridge Co. to cover a Santa Cruz

Co. debt: we know of his unlawful removal of N. W. Co. machinery and tools from Kendall to Santa Cruz; what chance, then, did the Standard have when it became a question of Dingee yielding to the man who had emphasized Dingee's criminal liability for a wrong that Dingee well knew he had committed? Evans knew that Dingee had betrayed his trust in one corporation: why was not Evans to believe that Dingee could be made to betray his trust in another? As Lord Esher, M. R. puts it, a man who has done one contemptible thing to benefit himself will do another, if necessary, in order to carry out and complete the object he has in view.

Exchange Tel. Co. vs. Gregory & Co., L. R.,
1 Q. B. D. (1896) 151.

J. *The Position of the Standard Corporation in March, 1908.*

And what was the position of the Standard Corporation at this critical juncture? The Standard and the N. W. Co. were separate, disconnected and independent corporations, organized at different times; and taking together all that we know of the respective histories of the two companies, it was and is utterly incredible that the Standard was panting with solicitude to purchase the bonds and stocks of the northern fiasco.

No Prior Relations.

Prior to March, 1908, these two companies had been as strangers: never before had there been any contact between them; never before had there been any relations of any sort between them, contractual or otherwise, that those familiar with their affairs knew anything about.

Compare, Howard, Record, Vol. I, p. 271.

And no one pretends to claim that there were any prior relations between the two companies. Never before had the Standard made, or even remotely attempted to make, any purchases of the bonds or stocks of the N. W. Co.: the only so-called purchases ever mentioned in the entire history of these companies, were very significantly just those, and those only, which are involved here: this was the solitary and isolated instance.

No Necessity for Purchase.

There was no corporate need, occasion or necessity for the Standard to purchase this handful of bonds of the Northern fiasco.

No one realized this more clearly than these very parties; and it was not until Howard had returned from his first interview with Dingee, that any of them thought of utilizing the Standard in the process of getting rid of the bonds and getting the money back.

That the Standard did not enter into Howard's calculations is perfectly apparent from his reference to the sale of the B. B. & B. C. Ry., contained in his letter of Dec. 26, 1907, to Evans:

Record, Vol. II, p. 531-2.

At this time, Howard was thoroughly familiar with Evans' state of mind: he was casting about for some way out for his friend, Evans: but plainly he did not then dream of the sacrifice of the Standard,—that the Standard should, with the knowledge, consent and approval of the Howard bondholders, be made the scapegoat for Dingee's N. W. Co. sins, never at that time, entered Howard's head.

Howard admits that he acted as errand boy for Evans and the rest when interviewing Dingee in March, 1908: but when the errand boy came to Dingee, no thought was then in the mind of Evans, Dingee or Howard that the notes of the Standard Corporation should issue. What Dingee proposed was that he would issue the notes of the Santa Cruz Co.—not those of the Standard; and it was only upon Howard's return to report to Evans that he, Howard, not Evans, not Dingee, for the first time, originally suggested the Standard notes, *if they could be had*.

No pretense was made that the Standard should issue its notes because there was any corporate need, occasion or necessity why it should do so; nor was there any pretense that the Standard was under any

obligation whatever to do so, whether arising from any relations with the N. W. Co. or otherwise. On the contrary, Howard advised taking the Standard notes, *if they could be had*, solely upon the ground that the Standard would make the more preferable debtor.

But even at this time, there was doubt and uncertainty in Howard's mind as to whether Dingee would go so far as to issue the Standard notes; and this doubt and uncertainty is given testimonial form in the language, "*if they could be had.*" Dingee, however, did issue the Standard notes; and the whole transaction emphasizes the contention that there was no corporate need, or occasion, or necessity, or obligation why the Standard should issue these notes. No other explanation can be made, consistent with the facts, except that these notes were part of a pre-arranged plan whereby the burden of Dingee's N. W. Co. shortcomings was transferred from him to this innocent and disconnected Corporation: the Standard was, with the knowledge, consent, approval and participation of the Howard bondholders, sacrificed to accomplish a personal purpose of its controlling officer, made necessary to be accomplished by his own wrongdoing in the affairs of an independent company.

No Financial Ability to Purchase.

The financial situation of the Standard is before the Court:

Trial Balance, April, 1908: Record, Vol. III,
p. 697-700.

Does not this exhibit demonstrate the absurdity of the Standard, in its then depressed financial condition, without any corporate rhyme, reason, necessity or obligation, and for the first and only time in its entire corporate history, purchasing a handful of the bonds of what Evans described as an abandoned enterprise?

*Issuance of Notes in Suit not Explainable upon any
Rational Business Theory.*

We have seen:

1. There were no antecedent relations between the two companies.
2. There was no corporate need, occasion, necessity or obligation to cause the Standard to issue these notes.
3. The depressed financial condition of the Standard could not normally, or upon any rational theory except that of corporate fraud, justify the purchase of any number of the bonds of a company which had no plant, whose operations had ceased, and whose success was not assured—but the reverse, a monumental failure.

It has, however, been claimed here that the Stand-

ard had an object in acquiring these bonds and stocks, because it wished to control the cement field, and anticipate and prevent competition. This claim is found in the cross-examination of Evans.

Record, Vol. I, p. 222-3.

And even upon the oral argument of this cause, it was contended that this desire to preempt the Northern cement territory, furnished a strong reason why the Standard Corporation should have interested itself in North Western securities. But this claim and contention will not bear investigation.

a. Notwithstanding this alleged anxiety by the Standard to purchase the bonds and stocks of the N. W. Co. so as to acquire a foothold in the north and thus head off adverse competition there, yet the eloquent fact remains that the Standard, although controlled by the same man who controlled the N. W. Co., never originally subscribed for a single bond or a single share of stock of the N. W. Co.: and this although, as Evans says, Bachman made this declaration:

Record, Vol. I, p. 223.

b. No other bonds or stock of the N. W. Co., except those actually involved in this suit, were ever, at any time, or by any person, even claimed to have been purchased by the Standard: the bonds and stocks

involved here are the solitary bonds and stocks ever claimed to have been purchased during the entire history of these companies; and this fact is fatally inconsistent with the asserted anxiety to purchase.

c. No plant was at Kendall in May, 1908, all operations had ceased, and all machinery and tools had been shipped away; nor could the N. W. Co. have established a plant at Kendall if it had wished—it has not yet even paid for the spur track: Record, Vol. III, p. 688. The N. W. Co. was bankrupt: its funds were dissipated: its securities were worthless; it was utterly dead; and all this the business world knew. What rational hopes based upon the N. W. Co. could the Standard entertain?

d. How could the purchase of N. W. Co. bonds and stock be vital to the protection of the Standard in March, 1908, when the time for protection had gone by, and when the field was already occupied by more alert rivals which had outstripped the N. W. Co., and had erected their plants and were marketing their product while the N. W. Co. languished a dead and inert failure. First factory—great advantage:

e. Even if the N. W. Co. had started promptly, yet it would have been an independent plant which could undersell the Standard at least in northern markets, because of its freedom from freight charges, etc., to which the Standard would have been subject: can

any imagination picture Evans foregoing this advantage merely to please Dingee?

f. What appreciable business was the Standard doing on Puget Sound that required protection by the purchase, in March or May, 1908, of the bonds or stocks of a company with such a history as that of the N. W. Co.? Or perhaps the dream was that much fresh business would accrue to the Standard because it had purchased bonds and stocks in a company enjoying such gorgeous success and magnificent prospects as the N. W. Co. enjoyed in March, 1908?

g. Of what use to the Standard would be this insignificant quantity of bonds, either for the purpose of controlling the N. W. Co., or as a protection against other active, developed, operating concerns already in the field?

h. These bonds were listed nowhere: of what use were they for any business purpose, whether as collateral or otherwise?

i. In March, 1908, after the N. W. Co. had risen to the bad eminence of an abandoned enterprise, and when the use of its bonds to protect anything with what had become a screaming farce, and when Evans had become so impressed with the futility of those bonds that he was anxious to get rid of them, how could this insignificant number of *such* bonds enable

the Standard to accomplish any tangible business results in any direction, then or thereafter?

j. The purchase of the bonds and stocks of the N. W. Co. by the Standard was not needed for purposes of protection. Not only was there nothing to be protected, not only had the time for protection gone by, but Dingee was already in conceded control of all of the companies concerned, and did not require *these* bonds to enable him to protect any of the companies under his control.

k. No such claims as this were made by Dingee or anyone else in March, 1908: Evans was not abandoning his investment for the purpose of protecting his investment; and Dingee took the bonds for another and wholly different reason—to protect himself against the consequences of his own wrongdoing. Dingee would have taken these bonds *personally*, if he could: that was the first thought that he expressed, and not the thought that the Standard would take them for protective purposes; and it was only because he knew that he could not take them, and that Evans was clamoring for his pound of flesh, that Dingee, at the suggestion of Evans, conveyed through Howard, violated his fiduciary duties, and unloaded these worthless things upon an innocent corporation then under his sinister control. At none of these meetings or conferences was there any discussion of the protection of the Standard from adverse competition. As al-

ready pointed out, what Dingee first offered was the Santa Cruz note, and at first it was not at all certain that the Standard note could be had: this is entirely clear from Howard's narrative.

l. There would have been no sort of business sense in the Standard throwing away its money on these bonds, unless it intended to finance the N. W. Co.: but this, its own depressed financial condition would not permit it to do. And indeed, since May, 1908, we do not find that the Standard ever attempted anything whatever in the way of rehabilitation of the N. W. Co. All that the Standard ever did was to repudiate these alleged notes.

m. If it were so very vital to the Standard to have this northern connection, and if there had been any real intent to establish a plant there, why did the Standard Corporation wait for over a year before purchasing an insignificant amount of bonds which could of themselves give it no control of the N. W. Co., and which was the sole and solitary purchase ever made by it,—and that too just when the Howard bondholders were complaining of the derelictions of the man who controlled both companies and were not backward in referring to his criminal liability?

This whole contention is a sheer afterthought, conjured up by the exigencies of the situation, and the desire to present some theory to explain and account

for the very extraordinary act attributed to the Standard.

Summary of Situation in March, 1908.

What, then, was the situation in March, 1908? The enterprise at Kendall was a failure: there were no assets there beyond the hole in the ground: no plant was established: there was neither production or sales: no rates were ever definitely fixed with any carrier: Kendall never had a market or a selling agent: it never was in operation or turned out a pound of cement: it had no machinery worth mention: what little machinery or tools it had, were shipped away to Santa Cruz: there was nothing to represent or secure its bonds: its stock plainly had no value: it does not appear that either its bonds or its stocks were ever listed: all operations ceased in November, 1907: it has ever since been abandoned, deserted and desolate.

Evans, Dingee, Bachman and Howard had all been deep in this scheme from the beginning of things: the original idea was that of Howard and Evans, but it was nursed along by all of them; and in Evans' mind, Dingee and Bachman were Howard's "associates." In May, 1908, and prior thereto, to the knowledge of all of them, Dingee was combing the San Francisco streets for money; and ever since March 26, 1908, Dingee was under constant financial obligation to Howard growing out of the discounting of accept-

ances; and naturally, as we have seen, Dingee was fearful of losing Howard as sales agent.

Howard realized his own sense of responsibility, moral and otherwise, to those to whom he had sold bonds; and Evans was not willing that he should forget it, or slow to remind him of the friends "to whom you sold the bonds."

Letter of February 10, 1908: Record, Vol. II, p. 546.

But Evans became agitated and dissatisfied as counsel admits, and suspicious: with Howard's help, he obtained the results of an investigation: he learned of Dingee's misappropriations, thoughts of criminal liability entered his mind: he turned upon Dingee, who could not help himself; and then Dingee, to serve his personal interest, turned on the Standard, with Evans' knowledge and consent, and sacrificed it—became to it the same faithless fiduciary, the same betrayer of his trust, that he had been to the N. W. Co. and the consequence of this evil combination was that the notes of the Standard Corporation, a separate, independent and disconnected corporation, having no need or funds for the purchase of any bonds, much less those of an abandoned enterprise, were issued so that those concerned might go through the motions of making an alleged sale at par of bonds malodorous through the delinquencies of Dingee committed with the funds of the issuing corporation, to

the complete antecedent knowledge of Evans and Howard.

And when Evans took those notes he had antecedent knowledge that the Kendall enterprise was not a success; that the bonds and stocks had no honest market or other value: that there was no rational assignable motive why the Standard, itself heavily burdened, should purchase such a worthless unlisted commodity as the bonds and stocks of this monumental fiasco; that Dingee could not purchase, or pretend to purchase them, because he was a financial wreck: but yet, that the Standard was still under the control of the wrongdoer. What equities are there here to which this scorched speculator may justly appeal? Having been scorched, he now seeks to offer up an independent and innocent corporation as a sacrifice for the purpose of enabling him to get back his money; and it is a matter of the most supreme indifference to him what fraud may have been committed upon the Standard, so long as he gets his money.

There is a plain simultaneity and progressiveness, a fixed purpose and plan running all through this history so creditable to high commercial morality and ethical standards: indeed, many of the leading facts occurred during the first six months of 1908. Thus, we have:

The gap in the correspondence from January to March, 1908.

Evans' consultation with Howard on Puget Sound.

Wenzelburger received his stock on February 10, 1908—the same day that Evans wrote one of the criminal liability letters to Howard.

Wenzelburger made his report to Howard on February 27, 1908, and Howard immediately sent it to Evans.

Wenzelburger turned back his stock on April 13, 1908.

Evans having already, in December, 1907, sent unanswered letters to Dingee, now came to San Francisco *as soon as he could* after receiving the report. Letter of January 29, 1908: Record, Vol. II, p. 536-7.

After Evans learned of Dingee's misappropriations, he wrote the second criminal liability letter of March 4th, 1908.

Upon arrival in San Francisco, Evans went at once into consultation with his fellow bondholder Smith, and with Howard.

Thereupon ensued Howard's interviews with Dingee.

Evans then rejected the Santa Cruz note, and accepted the Standard.

Immediately upon the settlement of the plan of action, Howard began advancing money to Dingee.

When the notes were made, Howard, like Evans, turned back his stock.

And through all this, we have, as we have seen, the most intimate relations between Evans and Howard,

and Howard and Dingee, and Dingee and the Standard: We have this delightful little circle of intimacy and influence, namely:

Evans plus Howard;
Howard plus Dingee;
Dingee plus the Standard.

Was anything necessary, then, so to complete the circle as to give us, Evans plus the Standard? The sequel demonstrates that there was not.

As observed by Mr. Justice Ladd:

“The influence of intimate association is often more potent than business discretion.”

Germ. Sav. Bk. vs. Des Moines Nat. Bk., 98
N. W. (Iowa), 606, 607.

In view of the facts, may any of these parties successfully maintain his independence of, or isolation from, the others? Do not the facts exhibit that intimate coherence so characteristic of community of interest? Were not these people closely connected by personal and business relations, by a common interest and a common purpose? Were they not frequently in each other's company? Do we not find them lunching, corresponding and consulting together? If these people were strangers, unconnected by any of those sets of facts which combine men's purposes, one might not so readily believe them to be animated by a com-

mon design against the Standard: but where we find them all, from various motives, consistently seeking the accomplishment of that common design, we have no difficulty in perceiving the unification of this coterie and the singularity of purpose that animated them. Could these people be heard for a moment to profess that facts known to, or schemes intended by, one of them, were not known to or intended by all of them? Fortunately, as was said in a recent case:

“Courts will not pretend to be more ignorant than the rest of mankind.”

Power vs. Bowdle, 54 N. W. (N. Dak.), 404.

And, as remarked by Mr. Justice Sherwood:

“Neither courts nor juries are required to believe nonsense merely because it was sworn to.”

State vs. Gurley, 70 S. W. (Mo.), 875.

And to the same effect, *inter alia*:

Blankman vs. Vallejo, 15 Cal., 638;

Quock Ting vs. U. S., 140 U. S., 417.

Evans' Knowledge in March, 1908.

Mr. Evans is entitled to no consideration as an innocent taker, in good faith, of the notes of the Standard Corporation: on the contrary, he knew that he was *particeps* on one of the grossest frauds ever perpetrated by a fiduciary upon his *cestui que* trust.

What does the record show as to Evans' knowledge? The following list of facts within Evans' knowledge prior to his taking the Standard notes, is not exhaustive:

- 1.—Evans knew that the N. W. Co. and the Standard were separate, independent and disconnected corporations.
- 2.—He knew that Dingee was an officer and director of each company, and controlled both.
- 3.—He knew that the relations between Howard and Dingee were intimate.
- 4.—He knew that the N. W. Co. was non-producing, that it had no plant, that it was not a going concern, that it paid no dividends, that it had neither income nor sinking fund, that it was deeply in debt, and that it was not a success.
- 5.—He knew that while it was important to establish the N. W. Co. plant before rivals got the start, yet this was not done, and the N. W. Co. had missed its opportunity: Record, Vol. I, p. 192.
- 6.—He knew that the Santa Cruz Co., another Dingee enterprise, had just started, with a heavy debt and poor product, and its success was not assured.

- 7.—He knew that Howard was active in promoting the N. W. Co. and floating its bonds.
- 8.—He knew that Howard, Dingee and Bachman were to share “alike” in the N. W. Co. promotion profits.
- 9.—He knew that there never was a stockholders’ meeting of the N. W. Co. subsequent to November 3, 1906, the date of the authorization of the bond issue.
- 10.—He knew that work had stopped at Kendall, and that there was no immediate prospect of its resumption.
- 11.—He knew from the disclosures of the Wenzelburger Report, if not before, that Dingee had wrongfully diverted the funds of the N. W. Co.: he knew, in other words, that Dingee had betrayed his trust in one corporation; and he well knew that such a man, to serve a personal interest, would betray it again in another corporation. This very human characteristic was recognized by Lord Esher when he said that a man who has done one contemptible thing to benefit himself, will do another, if necessary, to carry out and complete the object he had in view.

Exchange Tel. Co. vs. Gregory & Co., L. R.
1 Q. B. D. (1896), 151.

There may be a "probability that the course followed in one instance would be followed in others";

Bone vs. Hayes, 154 Cal., 759, 767.

And so:

"When one discovers that he has been put upon and defrauded as to one material matter, notice is at once brought to him that the man who has been false in one thing may have been false to him in all, and it becomes incumbent upon him to make full investigation."

Evans vs. Duke, 140 Cal., 22, 28.

- 12.—He knew that the Santa Cruz Co. was one of the very companies to which Dingee had diverted N. W. Co. funds.
- 13.—He knew that Dingee had ignored his letters seeking information.
- 14.—He knew that there had been no antecedent relations, prior to March, 1908, contractual or otherwise, between the N. W. Co. and the Standard.
- 15.—He knew that he had been suspicious long prior to March, 1908; and that, prior to his receipt of the Wenzelburger Report, he had become "very sore" upon his N. W. Co. investment.

- 16.—He knew that he wanted to get out of his N. W. Co. investment: that he wanted to get rid of the bonds; and that he wanted his money back.
- 17.—He knew that Dingee was “broke”: that he was borrowing money everywhere; and that he was unable to take the bonds or pay for them.
- 18.—He knew that while Howard had never put a dollar of his own money into the N. W. Co. scheme—was not “a *bona fide* investor,” yet Howard fully realized his responsibility to those who bought bonds from or through him, and Howard had agreed to look after Evans’ interests as he would after his own.
- 19.—He knew that Howard had approached Dingee as the representative and spokesman of the Howard bondholders.
- 20.—He knew that the Santa Cruz Co. note—the note originally proffered by Dingee—was insufficient, and so rejected it.
- 21.—He knew of no corporate necessity, obligation or compulsion justifying the Standard, especially in its then financial condition, in purchasing this meager quantity of the bonds of an abandoned enterprise.
- 22.—He knew that these notes were the result of a personal interview between his representative

and the fiduciary of an independent corporation, already guilty of corporate betrayal, already the recipient of significant suggestions as to his criminal liability, and already in desperate financial straits.

- 23.—He knew that Dingee's control over the Standard and the Santa Cruz Co. was so firm that his ability to give the note of either company was unquestioned.
- 24.—He knew that, under all the conditions, it was Dingee's wish, for his own sake, to placate the Howard bondholders.
- 25.—He knew, as far back as March, 1908, that the plan adopted to appease the malcontent bondholders, was to cause a disconnected and innocent corporation, by reason of its being in the control of the wrongdoer, to go through the form of issuing its note to purchase alleged bonds of an abandoned enterprise.
- 26.—He knew that he never sent any bonds or stocks to the Standard.
- 27.—He knew that the bonds and stocks of the N. W. Co. were listed nowhere: that the enterprise was not a success; that the bonds and stocks fell with the enterprise, and were of no value; and that that was why he was so anxious to get rid of them.

- 28.—He knew that neither the Kendall land, nor any other alleged “asset” of the N. W. Co. was good for the bond issue; and that Howard had told him so.
- 29.—He knew that the N. W. Co. bonds and stocks were never listed among the Standard assets, nor these notes among the Standard liabilities.
- 30.—He knew that this pretended sale of these wretched bonds and stocks of an abandoned enterprise to the Standard, was the merest sham and involved as gross a breach of fiduciary obligation and as inexcusable a corporate fraud as the books will exhibit anywhere.

Evans could do very nicely with a mere “intimation”:

Record, Vol. I, p. 178.

Can Mr. Evans pose here as a simple, misguided innocent? Can he affect the role of an innocent taker without notice? Was that not as deep in the scheme as any of them? Did he not, with full knowledge, accept the notes of an innocent corporation for worthless securities at their par value? Can he now invoke the aid of equity to compel that sacrificed corporation to complete the sham? What does the California Civil Code say?

Civil Code, Secs. 18, 19.

And what does the ultimate tribunal say?

"To constitute a *bona fide* holder of a note or check it is necessary—

"1. That it should have been received before maturity;

"2. That a valuable consideration should have been paid for it; and

"3. That it should have been taken without knowledge of the defenses sought to be made."

Hunt, J. *Mayor vs. Ray*, 19 Wall., 482.

"Wherever inquiry is a duty, the party bound to make it is affected with knowledge of all he would have discovered had he performed the duty."

Strong, J. *Cordova vs. Hood*, 17 Wall., 8.

"Means of knowledge with the duty of using them are, in equity, equivalent to knowledge itself."

Strong, J. *Cordova vs. Hood*, 17 Wall., 8.

"Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained, by the exercise of reasonable diligence."

Waite, C. J. *McClure vs. Township of Oxford*, 94 U. S., 432.

And see, also:

Standard Assn. vs. Aldrich, 163 Fed., 216;
McCloskey vs. Goldman, 115 N. Y. S., 189;
Simmons' Nat. Bank vs. Dillon Foundry Co.,
 130 S. W. (Ark.), 162;
Underwood vs. Germ. L. S. Co., 67 S. E.
 (N. C.), 587.

“‘Good Faith’ is an honest intention to abstain from taking any unconscientious advantage of another, together with an absence of all information or belief of facts which would render the transaction unconscientious.”

Cardenas vs. Miller, 108 Cal., 250, 257.

But between this definition and Evans' mental conditions there was an impassable gulf.

Evans' State of Mind in March, 1908.

Such was Evans' knowledge in March, 1908: what was his state of mind?

1. He had, in the beginning, entertained “Great Expectations” concerning the N. W. Co.

Willing and anxious to invest:

Record, Vol. I, p. 149: Vol. II, p. 393-4, 552.

2. But he also felt anxiety about the progress of the scheme, the forthcoming of the funds for the plant, and the keeping of the promises made to him. This

appears constantly throughout the record, and but one illustration will suffice:

Record, Vol. II, p. 492-3.

3. But when he received Wenzelburger's Report, he knew that the funds for the plant were not forthcoming:

Record, Vol. I, p. 174.

4. And he also knew that "only a little" of the proceeds of the bond issue had been employed in the development of the N. W. Co.:

Record, Vol. I, p. 192.

5. And he also knew that the N. W. Co. was not a going concern, but abandoned on account of the financial stringency for the time being,—an abandonment which nothing in this record shows to have been ever cured.

Record, Vol. I, p. 192.

6. Very naturally, these things aroused Evans' suspicions and sorrow:

a. Howard tells us of Evans' constant complaints:

b. Evans complained as far back as May 17, 1907:

Record, Vol. I, p. 155.

c. And again, prior to September, 1907:

Record, Vol. I, p. 158-9.

d. In point of fact, he had given expression to his sorrow and suspicions during the August preceding:

Record, Vol. II, p. 523-4.

e. In the following month, he doubts again:

Record, Vol. II, p. 525-6.

f. Again, on December 11, 1907, we have more suspicions:

Record, Vol. II, p. 527-8.

g. And nine days later, he writes Dingee and suggests "in the interest of all concerned, to abandon the project for the time being, and return the bondholders their money."

Record, Vol. I, p. 160-161.

h. This letter being unanswered, he writes again to Dingee on January 6, 1908, enclosing a copy of the letter of December 20, 1907: but again, his communication is ignored:

Record, Vol. I, p. 161-3.

7. Is it any wonder, then, that when his expectations were shattered, he became "*very sore*"?

Letter to Howard of December 20, 1907:

Record, Vol. II, p. 530-1.

Written same day as the first unanswered Dingee letter.

8. He resented the turning of the N. W. Co. into a loaning institution.

Record, Vol. I, p. 192-3.

9. His state of mind was such that he thought it best to get rid of the bonds:

Record, Vol. I, p. 192.

Lost confidence in Dingee: Refused to accept his assurances that the work at Kendall would go on.

Record, Vol. I, p. 191-2.

10. By the end of January, 1908, he intended to get satisfaction out of Dingee:

Record, Vol. II, p. 536-7.

11. In February, 1908, he speaks of Dingee's criminal liability and prosecution.

Record, Vol. II, p. 546.

12. And he recurs to the subject on March 4th, 1908:

Record, Vol. II, p. 549-550.

13. And Percy, whom Ernest had no secrets from, reflects the same state of mind:

Record, Vol. I, p. 213: Vol. II, p. 504; Vol. III, p. 894-5.

14. And Howard's explanations throw further light upon the state of Evans' mind.

Holds out hopes to Evans:

Record, Vol. II, p. 531-2.

Admits the "wrong":

Record, Vol. II, p. 534-5.

Concedes inadequacy of investment:

Record, Vol. II, p. 535.

The Dingee Interviews.

Such being the situation, position, relations, financial condition, knowledge and state of mind of the parties in March, 1908, what were the Dingee interviews?

Evans' version is contained in his Deposition:

Record, Vol. I, p. 186-8.

a. In the selection of Howard as representative, we see a recurrence to a point of view which is frequently suggested throughout the record,—“we made our subscriptions to these bonds through him.”

Record, Vol. I, p. 187.

b. “It was not advisable, in view of the financial situation, to press the construction now.”

Record, Vol. I, p. 188.

Here, we have another light on Dingee's financial position. Nor has any construction been attempted since: Kendall is as much abandoned to-day as it was then.

c. "If your friends are uneasy, I will arrange to buy these bonds back."

Record, Vol. I, p. 188.

But why should not Howard's friends be uneasy? Had they not good cause to be uneasy?

Did not Dingee know that they were uneasy? Had he not heard complaints innumerable? Did he not know about Wenzelburger investigation? Did he not know that he had been an unfaithful fiduciary? Did he not know that the phrase "criminal liability" was too much upon the lips of Howard's friends?

"I will arrange to buy these bonds back": if all things were regular, what obligation was Dingee under to buy back anybody's bonds? Why should he have done this incriminating thing? And what constrained him that he should do it upon a mere request from the author of the criminal liability letters? And what knowledge did these Howard bondholders have, which emboldened them to expect that Dingee would arrange to buy back these bonds?

d. "I cannot pay for them myself."

Record, Vol. I, p. 188.

This plainly shows Dingee's financial position then. And as bearing thereon, see:

Record, Vol. I, p. 189-190.

What then did Evans expect Dingee to do except unload the rubbish upon one of his cement corporations?

e. "I can arrange either with the Standard Portland Cement Company to buy them, or the Santa Cruz."

Record, Vol. I, p. 188.

In this very characteristic form of expression, we hear the voice of the controller of these companies—of the man who was their fiduciary in a double sense, not only by the general principles of corporation law, but also by reason of his special relations to the companies. And this use of the first person singular is not infrequent with the arbiter of the destinies of these companies: thus, we have:

"I will arrange to buy these bonds back":

Record, Vol. I, p. 188.

"I will arrange to retire the bonds":

Record, Vol. I, p. 189.

And so, we find this fiduciary of the two companies giving his choice to the malcontent bondholder of a stranger company, between the notes of two companies

which had no relation to or interest in the stranger company, in order to subserve a personal end of that fiduciary,—and this, to the knowledge and with the consent and participation of the malcontent bondholders:

Record, Vol. I, p. 204.

Very plainly, Dingee was transferring to corporations under his control, a burden that he should have borne himself: he was sacrificing his *cestuis que trustent* to his personal advantage: he was committing a fraudulent breach of trust, for his personal profit. It nowhere appears that he took the trouble to consult his stockholders or directors: on the contrary, it does appear that the entire deal was arranged without the slightest reference to stockholders or directors. It nowhere appears that either of these corporations was out in any market anxiously seeking to snap up the unlisted bonds of an unsuccessful enterprise. It nowhere appears that there was any corporate reason why they should do so insane an act. It nowhere appears that they had any surplus funds to waste in worthless so-called securities—quite the reverse. Nor can any explanation be produced, consistent with the facts in this record, to account for the issuance of these notes, except that Dingee, in his extremity, by reason of his control, and with the knowledge of the Howard bondholders, simply used these companies for

his personal purposes,—became again the treacherous fiduciary.

And was not Dingee's offer of a choice between the notes of two independent corporations that were quite dissociated from the N. W. Co. and its bonds, of itself a red badge of warning to Evans and the rest? How was it possible that Dingee could honestly issue as he pleased the note of either of these corporations in a matter in which neither had the slightest corporate concern? Is it not somewhat extraordinary that Dingee, without any prior consultation with stockholders or directors, and in a matter which involved his own wrongdoing in the affairs of another company, could, as between the Standard and the Santa Cruz, and for his personal advantage, deliver as he pleased the note of either? Evans knew all the facts: and unless he lacked the mental development of a troglodyte, he knew that the situation spelled fraud and nothing else: fraud upon the corporation that was selected for the sacrifice: fraud that he was prepared to participate in so as to get rid of the worthless bonds and recover his money: fraud that he did consciously participate in.

The managing officer of a corporation cannot dispose of its notes at his will: nor can he transform his corporation into a corporation sole.

Wheeler vs. Bldg. Co., 159 Fed., 391, 393-4;
Am. Mach. Co. vs. Norment, 157 Id., 801, 804;

Woodruff vs. Shimer, 174 Id., 584, 586;
Wheeler vs. Mg. Co., 71 Pac. (Colo.), 1101;
N. La. Assn. vs. Milliken, 35 So. (La.), 264,
 266.

Howard Version. Howard tells us that he had two interviews with Dingee.

Evans does not agree to this: he insists that there was but one:

Record, Vol. I, p. 190.

Howard's First Interview. On this occasion, he "was offered the note of the Santa Cruz Portland Cement Company, with the endorsement of Dingee and Bachman. I reported back."

He was, he says, offered this note for the repurchase of the N. W. Co. bonds.

From this testimony it is plain that up to this time no one had thought of the Standard at all: it was then no more concerned in the matter than it was when Howard, seeking relief from Dingee for his friend Evans, told Evans of the possible sale of the B. B. & B. C. Ry. as affording a way out.

Record, Vol. II, p. 531-2.

And Howard went to Dingee because "they had suggested that I come round and talk with him about *relieving them of the investment*:"

Howard's Second Interview. When Howard re-

ported back, he "advised them that in my opinion it "would be better to take the note of the Standard "Company, if it could be had."

Here, we have the first appearance of the Standard upon the scene. The first intimation came from Howard, not from Evans, not from Dingee: but Howard never suggested that the Standard should take the bonds because it would thus secure protection in the north from adverse competition. There was no solicitude in the minds of any of those concerned, for the corporate welfare or future prospects of the Standard: on the contrary, the governing thought in the minds of all concerned, was merely whether the Standard was not a more acceptable debtor for Evans than the Santa Cruz Co. Evans was the objective point, not the Standard: Evans' welfare and wishes controlled, not those of the Standard; and no one gave any thought to the protection of the Standard from northern competition, because every one knew better—everyone knew that these worthless bonds would not protect anybody against anything.

Howard's reason why the Standard note should be taken, if it could be had, had nothing whatever to do with adverse northern competition: no such thought as that had any place in Howard's mind, on the occasion in question. From the testimony, the only permissible conclusion is that the real question was, not whether the Standard would purchase these bonds to

defeat adverse northern competition, or for any reason affect northern conditions as sworn to by Evans upon his deposition, but whether Evans would prefer the Standard as his debtor rather than the Santa Cruz: and this conclusion is strengthened by the declaration of Smith at page 975 of Vol. III of the Record, that Howard's suggestion "that the Standard Portland Cement Corporation would be a better corporation to deal with," was followed by Evans.

And it may be added that there is a clear discrepancy between Evans and Howard as to a very material matter affecting the Dingee interviews, namely, the extent of Howard's authority in those interviews. Evans, when a witness upon the Federal hearing, swore flatly that Howard had no authority upon this errand to Dingee either to make a proposal to Dingee or to accept one from him on behalf of Evans: but Howard affirmatively swears that after a consultation and discussion concerning the general affairs of the North Western, the unsatisfactory conditions affecting the bondholders' moneys, and the stoppage of work on the plant, it was finally concluded that he should visit Dingee *and suggest to him the repurchase of these bonds that had gone through Howard's office carrying out a notion that Howard had expressed in a previous letter to Ernest Evans.*

It is among the simplicities of the law in cases of this class that among the various elements to be considered are these, that the relations between the parties

concerned were intimate, that such intimacy is specially important where normally and in the particular transaction under investigation the parties should be adversary, that there were private meetings between them, that there were other concurring conditions, that their relations and meetings culminated into an agreement, that this agreement was of an inequitable nature, that thereafter the parties pursued a consistent course of conduct towards the consummation of such an agreement, and that the consequences of such agreement were injurious to the party against whom it was directed. In most cases the conclusion of fraud results from the grouped and aggregated acts, conduct, circumstances and relations of the parties: nothing, indeed, could be more improper than to segregate each element of proof from the others; because, by this course, a number of circumstances if taken singly might be regarded as harmless, whereas, were such circumstances taken altogether and considered as an entirety, they would indicate a consistent purpose and afford satisfactory proof of the fraud charged and of the participation in it. As observed by the Supreme Court of Maryland:

“This mode of dealing with separate pieces or items of evidence, segregated from all the other evidence of the case, is wholly unwarranted, and has no support in any principle of reason. The strongest case or defense, proved by a combination of facts, might be overcome and destroyed

by that method of dealing with the separate facts or items of proof."

Cover vs. Myers, 32 Am. St. Rep., 394-400.

And so, for example, when we come to contrast the motives impelling Howard to advocate the purchase of these alleged bonds by the Standard Corporation, with the reasons impelling Dingee to yield to Howard's demand all of the facts and circumstances should be considered together as a whole, and not by fragments. Thus, for example, upon the one hand, Howard's origination of the Puget Sound idea, his nursing of that project, his intimate connection with the North Western enterprise from the start, and his personal activity in launching it: Howard's intimate business and other relations with Evans and the others in the north, and his desire to maintain and continue those relations: Howard's intimate business and other relations with Smith and the others in San Francisco, and his desire to maintain and continue those relations with local people: the unfailing and persistent recollection of the bondholders that it was through Howard that they had purchased these worthless bonds (see for example *Evans*, Record, Vol. I, p. 187), and Howard's acknowledgment of the consequent responsibility "moral and otherwise" in his letters (see for example, letter of December 16, 1907: Record, Vol. II, pp. 529-530): Howard's knowledge of the financial condition of Dingee's Cement Com-

panies and his consequent alarm over the sacrifice of the money invested in these alleged securities. Howard's personal anxiety as illustrated by his turning on Dingee in his letters to Evans, and his suggesting the Wenzelburger investigation and other measures for the relief of these bondholders:—all this, and more, should be considered, not in a fragmentary way, but in connection with all the other facts and circumstances in the case bearing upon and illuminating Howard's motives throughout the transaction under discussion.

And so, upon the other hand, Dingee's actual wrongdoing in his embezzlement of North Western Company's funds: his knowledge that Evans and the others knew of this wrongdoing through the Wenzelburger investigation and otherwise: the control exercised by Howard in his capacity of exclusive sales agent, over Dingee's income derived from the sales of cement: the vast importance to Dingee of Howard and his selling organization, and Dingee's anxiety to retain that selling organization: Howard's threat during a critical time to discontinue that sales agency, which threat, if not averted by Dingee's promises to be good, would have expeditiously completed the ruin of the Cement Companies (Record, Vol. II, p. 539, 542, 543-5, 545): the depressed financial condition of Dingee's Cement Companies (Record, Vol. II, p. 543-5): Dingee's depressed financial condition in which he was unsuccessfully combing the streets of

San Francisco for money: the heavy load that Dingee was carrying, and his crying need for time: Evans' threats of criminal prosecution, and particularly as communicated to Dingee by Howard (letters of January 29, 1908, February 10, 1908 and March 4, 1908: and Percy, too, letter February 8, 1909 to John L. Howard): Evans' following up his threats by coming to San Francisco as soon as he could and consulting with Howard, Smith and Spencer, and preparing to "let loose the dogs of war" (letter May 10, 1909, Howard to Evans: Record, Vol. III, p. 902): the pointed significance of the extraordinary extent of Dingee's yielding to Howard, which went so far as even to give to these bondholders their choice of either cement company's note: coincidentally with Dingee's yielding to Howard, Howard began, on March 28, 1908, to make to Dingee those advances which Dingee needed so badly:—all this and more, we submit, should be considered, not in a broken way, but in connection with all the other facts and circumstances in the case illustrating the reasons which impelled Dingee to yield to Howard's demand made in that eventful interview in March, 1908, which took place privately and behind the back of the stockholders and even the manikin directors of this disconnected corporation, then, unfortunately under Dingee's sinister control. Of course, the various indicia referred to in this brief are not offered as exhaustive on the subject: because other illustrations, specific in

character as distinguished from the general inference of fraud, will be found. Some of these illustrations are particularly forcible, intrinsically considered: others are not only intrinsically convincing evidences of the fraud charged, but they acquire an added force from their relations to and with other facts and circumstances: for it must never be forgotten that here as in other departments of the law, even if a given fact standing alone might not be sufficient in and of itself and disconnected from the other facts in the case to establish the claim made, yet it may from and by its association with other facts and circumstances,—regarded cumulatively, so to speak, become of pregnant consequence. As Chancellor Kent puts it (2 Comm., 12 Ed., 484):

“A deduction of fraud may be made, not only from deceptive assertions and false representations, but from facts, incidents, and circumstances which may be trivial in themselves, but decisive evidence in the given case of a fraudulent design.”

SURROUNDING AND SUBSEQUENT EVENTS.

A. The Secrecy of the Transaction.

From the depositions and record, generally, one can not help drawing the inference that both Howard and Evans were rather adept in avoiding publicity; and it nowhere appears that the transaction whereby the burden of Dingee's shortcomings was sought to be shifted to an innocent and defrauded corporation, was

given any publicity. Outside of those immediately interested, no one seems to have been apprised of it.

And why was no stockholder's meeting called to determine whether the Standard should be obligated to ward off the consequences of its officer's wrongdoing in the affairs of another company? There was ample time: the conclave was held on March 25, 26, 1908: the special meeting was not held until May 5, 1908: did not the stockholders have a very vital interest in seeing that the corporation's assets, credit and funds should not be diverted from their legitimate purposes? Unless restrained by the by-laws, the directors may call a meeting of the stockholders whenever in their judgment a meeting would be proper: it is the right of the stockholders that corporate assets shall not be diverted to satisfy personal ends—that corporate assets shall be used for legitimate corporate purposes only: why then was there no meeting? What was there to hide?

Secrecy seems to be a characteristic of fraud. Usually, at some stage in the development of a fraudulent transaction, one encounters this earmark and badge of fraud. It is not, of course, to be expected that the actor will advertise his purposes in the daily journals, or invite disinterested persons to supervise the concoction and enactment of his schemes, or bawl his intentions from the housetops: but nevertheless, at some stage or other, in some form or other, this element of

secrecy will be perceived. Fraud, however, is a question of fact:

Hume vs. Scruggs, 94 U. S., 22, 28;

Lloyd vs. Fulton, 91 Id., 485;

Williams vs. Davis, 69 Pa. St., 28;

McKibben vs. Martin, 64 Id., 256;

Knowlton vs. Mish., 8 Sawy., 627.

“Circumstantial evidence is not only sufficient, but in most cases it is the only proof that can be adduced.”

Rea vs. Missouri, 17 Wall., 543.

“The fraudulent conspirators will not be prompted to proclaim their unlawful intentions from the housetops, or to summon disinterested parties as witnesses to their nefarious schemes. The transaction, like a crime, is generally consummated under cover of darkness, with the safeguards of secrecy thrown about it.”

Wait, Fraud. Com., Sec. 13.

Secrecy, says the Supreme Court, “is a circumstance connected with other facts from which fraud may be inferred.”

Warner vs. Norton, 20 How., 460.

Parties practicing fraud almost invariably resort to expedients to conceal the evidence of it. Fraud

always takes a tortuous course, and endeavors to cover and conceal its tracks.

Sarle vs. Arnold, 7 R. I., 585;

Marshall vs. Greene, 24 Ark., 418.

And Chancellor Kent says:

“A deduction of fraud may be made, not only from deceptive assertions and false representations, but from facts, incidents and circumstances which may be trivial in themselves, but decisive evidence in a given case of a fraudulent design.”

2 Kent, Comm., p. 484.

B. The Special Meeting.

To carry out the plan agreed upon, and as a step in its development, a pretended special meeting was had on May 5, 1908. The only directors who attended were Dingee, Bachman and McGary; and from what we have learned in this cause, the meeting was entirely an Addicks' meeting:

Pepper vs. Addicks, 153 Fed., 383, 397, (Par. 22, 1st sentence) 403, 406-7.

Such meetings must be attended by a legal quorum.

Civil Code, Sec. 305;

Basset vs. Fairchild, 132 Cal., 637.

But the position of Dingee was such at this time

that no legal quorum was present; and much, if not all, that may be said of him, will be applicable to the other two. Dingee's presence was necessary to constitute a quorum: but since he was disqualified by interest, it is plain that there was no quorum.

Dingee was in unquestioned control of all three cement companies: he was a fiduciary of all three; and his relations to these companies involved, under the situation here, a violation of duty by him whichever way he turned. Thus, when Evans arrived in San Francisco, and dispatched his alter ego, Howard to Dingee, the self interest of the latter, all concerned knowing of the illegal misappropriation of the N. W. Co. funds, would naturally prompt him to do the best he could for himself by transferring his burdens to his Standard Corporation, with the consent of the Howard bondholders.

Upon the other hand, he was, as Vice President of the Standard Corporation, a fiduciary for that Corporation: all his interest, duty and obligation belonged to it: he was its trustee, bound up to it, and obligated to subserve its interests, by every possible consideration suggested by his trust: he was the trusted protector of its interests, and bound to subserve those interests in preference to his own,—bound to render it complete and qualified fealty by every consideration known to equity and morals. And all of this, these Howard bondholders well knew.

In any transaction which involved these Howard

bondholders, the N. W. Co. of which also Dingee was a fiduciary, the Standard Corporation, and the claims of N. W. Co. bondholders against Dingee growing out of his misappropriation of N. W. Co. funds and the cessation of operations at Kendall, Dingee was at once forced into a position which involved an intolerable and inequitable antagonism of interests: and whichever way Dingee might turn, some interest would suffer; but no court, certainly no court of conscience, could countenance traffic of that sort.

As said by Judge Ross:

“Occupying as he did the position of trustee, he should not have put himself in a position adverse to his *cestuis que* trusts. One cannot faithfully serve two masters whose interests are diverse.”

Davis vs. Rock Creek, etc. Co., 55 Cal., 359, 364.

These Howard bondholders were acting in concert with Dingee ever since the meeting of minds on March 25, 26, 1908: they were not strangers to each other: they had dealt together before: they were all fully cognizant of all the relevant facts: they all knew how these notes came about: they all knew that they did not represent a legitimate corporate obligation of the Standard: they all knew that there never were any antecedent relations between the N. W.

Co. or themselves and the Standard, out of which any corporate obligation of the latter could have grown: they all knew that these notes were designed to meet their claims and demands upon Dingee growing out of his wrongdoing in the affairs of the N. W. Co., and that their causing the transaction to take the form of a sale of a mere handful of useless and worthless bonds of an abandoned enterprise to a corporation which had neither need or use for them and was itself financially depressed, was a bare-faced sham, and a mere cloak designed to conceal the real nature of the deal; they knew that, by these notes as the unlawful instrumentality, the burden of those alien delinquencies of Dingee was to be, and would be, taken from Dingee and imposed upon the Standard; they knew, none better, that the whole deal, in which they all participated, and which they all assisted, was nothing more than a rank imposition and fraud upon the Standard, made possible by Dingee's hold on the Standard, and their hold on Dingee; they knew all of this, and yet they appeal to equity to put a premium upon the fraud by consummating the transaction for them.

How, then, can it be contended here that, at this special meeting, where Dingee's presence and vote were necessary; the one to the legal quorum and the other to the passage of the resolution which he introduced, Dingee was disinterested? It is certainly opposed to plain public policy that such notes should

be issued by the vote of a board of directors who were the puppets and marionettes of an insolvent delinquent who was directly interested in transferring burdens and obligations from his own shoulders to those of the Standard; and the votes of those puppets and marionettes could not properly have any effect in Dingee's favor, or in favor of these bondholders, the conscious beneficiaries of these machinations, against the corporation or its stockholders.

Goodell vs. Verdugo Canon Water Co., 138 Cal., 308.

If, as both Dingee and the Howard bondholders well knew, these notes were not legitimate obligations of the Standard Corporation, but were in truth and reality evoked by and designed to meet claims made against Dingee because of his delinquencies in the affairs of another company, without regard to the rights or interests of the Standard Corporation, which was treated as Dingee's chattel to be prejudiced as he pleased, then the rules as to the action of corporate directors should clearly prevent any change in the situation to Dingee's advantage or to the advantage of these bondholders, as against the Standard or its stockholders. But these bondholders are here attempting to recover upon alleged notes of the Standard which were issued by directors in collusion with them and Dingee, and in the interest of Dingee and themselves. Such notes are void, and the law does not

stop to inquire into the fairness or unfairness of the transaction.

O'Neill vs. Quarnstrom, 6 Cal. App., 469, 474;
Hall vs. Auburn Turnpike Co., 27 Cal., 255.

And see:

Triplett vs. Fauver, 48 S. E. (Va.), 875;
Golden Glen Mfg. Co. vs. Stimson, 98 Pac.
 (Colo.), 727;
Camden Land Co. vs. Lewis, 63 Atl. (Me.),
 523;
Booth vs. Summit Coal Mg. Co., 104 Pac.
 (Wash.), 207;
Voorhees vs. Mason, 148 Ill. App., 647.

C. *Their Ceremonious "Sale."*

Could anything be more suggestive to an inquiring mind than the elaborate ceremonial by which the inherent and underlying vice of this transaction was sought to be masked? Do not the solemn farce of that special meeting of Dingee puppets whose wires their master pulled to accomplish a cut-and-dried scheme, the sanctifying spectacle of Dingee presenting a resolution demanded by Evans nearly six weeks before, the seconding thereof by McGary who always did whatever Dingee told him to do, the reels of red tape that, by prearranged scheme, were to strangle the Standard,—does not all of this flummery and clap-trap recall the remark of Mr. Justice Bradley?

"It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law."

Graffam vs. Burgess, 117 U. S., 180.

And see:

Schaferman vs. O'Brien, 92 A. D., 708, 711;

Drury vs. Milwaukee, etc. Ry., 74 U. S. (7 Wall.), 299; 19 1. 40.

These elaborate forms, however, are thoroughly understood and completely futile in equity:

"It is the province and delight of equity to brush away mere forms of law. Nowhere is it more necessary for courts of equity to adhere steadfastly to this maxim, and avoid the danger of allowing their remedies to be abused by penetrating all legal fictions and disguises, than in the complex relations growing out of corporate affairs.

Home Fire Ins. Co. vs. Barber, 93 N. W. (Neb.), 1024, 1032.

And equity, as already observed, always looks through the form to the substance,—through the ceremonial to the ulterior object: that is to say, even if each act which, in a given case, corporation directors, of their

own motion or at the dictation of their controlling master, propose to do, were conceded to be *intra vires* of the corporation; even if, also, each act proposed to be done were an act which these directors were not incapacitated by their own, or their master's, self interest from doing: still, if the ultimate object which they propose to effect by doing these various acts,—if the situation which by means of these acts they plan to create, or have had planned for them to create,—be injurious to the corporation or its stockholders, the chancellor will intervene to strike the transaction with nullity.

Theis vs. *Durr*, 104 N. W. (Wis.), 985, 988;

Wright vs. *Oroville Mg. Co.*, 40 Cal., 20;

Aikens vs. *Wisconsin*, 195 U. S., 194, 205-6.

The Law as to Corporate Frauds or Breaches of Trust.

Definition of Breach of Trust:

Pomeroy, Sec. 1079.

As applied to Corporate Officers:

Pomeroy, Sec. 1094.

Views of Sanborn, J., as to fiduciaries:

Trice vs. *Comstock*, 121 Fed., 620; 622-3; 626-7.

Views of Sanborn, J., as to Controllers of Corporations:

Wheeler vs. Bldg. Co., 159 Fed., 391; 393-4.

Views of the Supreme Court:

"We have the right to consider facts without particular proof of them, which are universally recognized and which relate to the common and ordinary way of doing business throughout the country."

Peckham, J. Nicol vs. Ames, 173 U. S., 517.

"Every holder (of stock) is a *cestui que* trust to the extent of his ownership."

Swayne, J. Farrington vs. Tennessee, 95 U. S., 687.

"An essential incident to trust property is that the trustee or bailee can never make use of it for his own benefit. Nor can it be subjected by his creditors to the payment of his debts."

Jackson, J. Strum vs. Boker, 150 U. S., 330.

"Undoubtedly the doctrine is established that a trustee cannot purchase or deal in the trust property for his own benefit or on his own behalf, directly or indirectly."

Fuller, C. J. Hammond vs. Hopkins, 143 U. S., 251.

"It is a general rule that a trustee cannot deal with the subject of his trust."

Hunt, J. Stephen vs. Beall, 22 Wall., 340.

Duties of Trustees:

"The law requires the strictest good faith upon the part of one occupying a relation of confidence to another."

Harlan, J. Wadsworth vs. Adams, 138 U. S., 389.

"We should be unwilling to weaken the obligation of good faith and fidelity required by the law of a trustee. We have frequently enforced such obligations in the most rigid manner."

Hunt, J. Stephen vs. Beall, 22 Wall., 340.

Parties dealing with Trustee.

"The law exacts the most perfect good faith from all parties dealing with a trustee respecting trust property. Whoever takes it for an object other than the general purposes of the trust, or such as may reasonably be supposed to be within its scope, must look to authority of the trustee, or he will act at his peril."

Field, J. Smith vs. Ayer, 101 U. S., 327.

Fraud exists wherever the interests of the corporation are deliberately neglected in favor of a per-

sonal or other interest: that is to say, to quote the language of Mr. Justice Peckham, recently of the United States Supreme Court, fraud exists in any scheme which is oppressive to the corporation or its stockholders, or "so far as opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to secure such interests, but that he must have acted with an intent to subserve some outside purpose, regardless of the consequences to the company and in a manner inconsistent with its interests."

Gamble vs. Queen's County Water Co., 9 L. R. A., 527, 530.

And see, also:

Wheeler vs. Mg. Co., 71 Pac. (Colo.), 1101;
El Capitan Co. vs. Loan Co., 69 Id. (Kans.),
 332;

Oliver vs. Oliver, 45 S. E. (Geo.), 232;
N. La. Assn. vs. Milliken, 35 So. (La.), 264;
Jacobs vs. Mex. etc. Co., 93 N. Y. S., 776;
McCourt vs. Singer-Bigger, 145 Fed., 103;
Nat. Co. vs. Chicago Co., 80 N. E. (Ill.),
 556;

Pepper vs. Addicks, 153 Fed., 383;
Bowers vs. Male, 78 N. E. (N. Y.), 577;
Steele vs. Mg. Co., 95 Pac. (Colo.), 349;

Nauces etc. Co. vs. Davis, 116 S. W. (Texas),
633;

Penn. Co. vs. Am. Co., 166 Fed., 254;

Mapes vs. German Bk., 176 Id., 89;

In re Swofford Bros., 180 Id., 549;

Montgomery Tr. Co. vs. Harmon, 37 So.
(Ala.), 371;

Baker vs. Ducker, 79 Cal., 365, 374;

Ashton vs. Dashaway Assn., 84 Cal., 61.

This Fraudulent Breach of Trust was participated in by the Howard Bondholders.

Can there be any reasonable doubt about this proposition? Does not the record here establish that these bondholders knowingly dealt, through their agent, Howard, with Dingee in a matter in which they were all interested: that they were not *bona fide* takers of the notes evolved from that transaction: that they took those notes subject to all existing equities in favor of the Standard: that they took those notes to satisfy what, *quoad* the Standard, were wholly foreign claims and demands; that they were not innocent parties: that they had immediate knowledge of all the facts: and that they had knowledge of numerous facts suggesting inquiry to a cautious man, and equivalent to knowledge of all that such inquiry would have disclosed.

I Cook, Sec. 293, p. 805, n. 1; 3 Id., 2656;
2573-4;

Civil Code, Secs. 18-19;

Kenniff vs. Caulfield, 140 Cal., 34, 45-6.

That these Howard bondholders were in intimate touch with the entire situation, from beginning to end, is illustrated throughout the depositions and record by a plenitude of evidence. That this participation in the history and transactions with which we are concerned here was continuous and unbroken, from beginning to end, is evidenced, among other things, by that portion of the Record included between pages 619 and 625. There, we find Howard and Smith, who are acting for these Howard bondholders, supervising the drafting, correction and settlement of the resolutions, notes, etc., to be used at the special meeting and in the consummation of the pre-arrangement which was arrived at on March 25th or 26th, 1908.

The plain truth is that the Howard bondholders not only knowingly participated in this fraudulent breach of trust, but actually insisted upon it; and this, because of their commanding motive—a financial motive: they saw that the N. W. Co. was a failure, that it had nothing to secure them, that its assets were insignificant and its funds misappropriated, and they were anxious to get out of the bad investment, to get rid of the valueless bonds, and to get their money back. They were, therefore, equally guilty with Dingee in this raid upon the Standard, and cannot

recover here; and to allow them to recover here would be to allow them to take advantage of their own wrong, and to put a premium upon fraud. The claims of these Howard bondholders upon these notes against the Standard, find no support in law, equity or good conscience: they exhibit neither honesty in their origin, nor justice in what they seek. No court will give its aid to the consummation of inequitable acts; and no principle is more fundamental than that which bars from courts of justice, whether of law or equity, those whose claims arise from their own wrongdoing.

The settled law accordingly is that all participants in a fraud or breach of trust are equally guilty, and none may derive any advantage therefrom through a court of justice.

Lincoln vs. Claflin, 74 U. S. (7 Wall.), 132;
S. D. & T. Co. vs. Cahn, 62 Atl. (Md.), 819;
Duckett vs. Bank, 63 A. S. R., 513;
In re Prospect Worsted Mills, 126 Fed., 1011;
McCourt vs. Singers-Bigger, 145 Id., 103, 110;
Pelton vs. Lumber Co., 112 N. W. (Wis.), 29;
Field vs. Western etc. Co., 166 Fed., 607;
Emerado Co. vs. Farmers Bk., 127 N. W.
 (N. Dak.), 522;
Wash. Ry. vs. R. E. Trust Co., 177 Fed.,
 306.

And the views of the Supreme Court are quite harmonious:

Good Faith.

"It is a principle in chancery, that he who asks relief must have acted in good faith. The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abettor of iniquity."

McLean, J. Bein vs. Heath, 6 How., 247.

"The rule in equity is very broad to prevent a fraud, which would exist if one was permitted 'to derive a benefit from his own breach of duty and obligation.'"

Woodbury, J. Carpenter vs. Providence Washington Ins. Co., 4 How., 223.

"Parties are not only bound to act fairly in their dealings with each other, but they are not to expect the aid of a court of equity to enforce an agreement made with the intent that it shall operate as a fraud upon the private rights and interests of third persons."

Clifford, J. Selz vs. Unna, 6 Wall., 336.

"A court administering justice upon principles of equity will not lend its aid to enforce the ful-

filment of a contract in favor of a party to it, which is founded in fraud."

Nelson, J. Carrington vs. Pratt, 18 How., 66.

"A court of equity will not stop halfway in the investigation of a fraud which is quite apparent, to give one of the parties to it affirmative relief at the expense of the other."

Miller, J. Walker vs. Reister, 102 U. S., 471.

Offensive Conduct of Plaintiff.

"A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity.

Brewer, J. Deweese vs. Reinhard, 165 U. S., 390.

Agreements by Holders.

"The holders of commercial paper, who enter into agreements or transactions with the makers or indorsers, affecting its validity or negotiability, cannot invoke protection against the infirmity which they have aided to create. There are no considerations of commercial policy which can exclude the parties in such cases from testifying to the facts."

Field, J. Davis vs. Brown, 94 U. S., 426.

"One who pays with knowledge of a fraud is in no better position than if he had not paid at all. He has no greater equity, and received no greater protection. Such is the rule as to contracts generally."

Hunt, J. Dresser vs. Missouri, etc. R. Const. Co., 93 U. S., 94.

Solicitude of Courts.

"Parties engaged in a fraudulent attempt to obtain a neighbor's property are not the objects of the special solicitude of the courts. If they are caught in their own toils, and are themselves the sufferers, it is a legitimate consequence of their violation of the rules of law and morality. Those who violate these laws must suffer the penalty."

Hunt, J. Neblett vs. McFarland, 92 U. S., 105.

And see, also:

In re Prospect Worsted Mills, 126 Fed., 1011;
McCourt vs. Singers-Bigger, 145 Id., 103;
Pelton vs. Lumber Co., 112 N. W. (Wis.),
 29;
Field vs. Western etc. Co., 166 Fed., 607;
Emerado Co. vs. Farmers Bank, 127 N. W.
(N. Dak.), 522;
Wash. Ry. vs. R. E. Trust Co., 177 Fed., 306,
 312.

The whole matter is thus summed up by Judge Thompson:

“Acts of manifest bad faith or breach of duty towards the corporation on the part of the president, are not binding upon it. Strangers who thus participate in a wrong against the corporation, cannot be allowed to profit by it.”

10 Cyc., 911: giving many illustrations and citing many cases.

And any person who instigates, connives at, and receives the fruits of, a corporate fraud, participates therein:

Woodroff vs. Howes, 88 Cal., 184, 188, 199.

And since I have just mentioned *Woodroff vs. Howes*, I may add a remark suggested by that case. We are all familiar with the rule conceded by counsel upon the oral argument that inadequacy of consideration is a factor in determining the presence or absence of fraud; and one supposes that no authorities need be cited in support of so well understood a principle. We have also seen the views of an accomplished Federal Judge as set forth in *Pepper vs. Addicks*, 153 Fed., 583; and *Woodroff vs. Howes* puts the accent of fraud upon the gross discrepancy which exists in this cause between the actual lack of value of the bonds and stock in question and the price that Dingee, acting through his directors, caused the Standard

to put upon them. This California case in effect holds that to sell land worth Three Hundred Dollars per acre for Thirty Dollars per acre is a fraud upon the corporation: how much worse then, because one happens to control the corporation, to compel it to purchase bonds and stocks which were utterly useless and worthless for any purpose whatever? And how can any participant in such a scheme expect to escape the consequences of his own wrongdoing?

Indeed in *Cropsey vs. Johnston*, 100 N. W. (Mich.), 182, it is held that knowingly paying more for corporate stock than it is worth, is a fraud by the trust upon the beneficiary; and this rule would seem to apply with equal force to the act of paying more for corporate bonds than they are really worth.

IV.

THE CONTENTIONS HERETOFORE PRESENTED HAVE AN IMPORTANT BEARING UPON THE LAW OF ESTOPPEL AND RATIFICATION.

(a) *The Real Scope and Limitations of the Law of Rescission.*

It is often loosely said that before one can rescind, he must restore all that he has received: but since this doctrine has been so frequently, and so successfully, used to shield the party guilty of fraud, it is not strange that the modern authorities have put very marked limits upon the doctrine itself. The origin of

the old rule lay in the fact that a common law court could not rescind, but could only treat as void that which was absolutely void *ab initio*; and therefore one who had received anything under a fraud practised must return to the rogue what the rogue had given him before he could begin to reclaim what the rogue had got from him: but the best considered cases in equity never have required anything like this, as we shall see as the discussion proceeds. Indeed, in equity, the *status quo* rule is rather an incident to, than a condition of, the relief (*Brown vs. Norman*, 4 So. (Miss.), 293), and that equity itself is available to meet the equities of each case, and concerns itself only with the things that were actually received. And in illustration of the tendency of modern courts to restrict the operation of the rule in question, and to increase the exceptions to it, we call attention to the following passage from a recent California case:

“Section 1691 of the Civil Code states the general rule applicable to one desiring to rescind. He must rescind promptly upon discovering the facts which entitle him to rescind, and he must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so. It will be assumed, in accord with the views expressed by this court in several cases, that one invoking the aid of equity to obtain a decree of

rescission must comply with this rule as a condition precedent to action, except in exceptional cases where, by reason of the circumstances, restoration or offer to restore is not essential, and that in this regard there is no distinction between an action on the equitable side of the court to obtain a decree of rescission and an action maintained on the theory that a rescission has been fully accomplished by the acts of the party. (*Kelley vs. Owens*, 120 Cal., 502, (47 Pac., 369, 52 Pac., 797); *Westerfeld vs. New York Life Ins. Co.*, 129 Cal., 68, 84, (58 Pac., 92, 61 Pac., 667); *Toby vs. Oregon Pacific R. R. Co.*, 98 Cal., 490, 499, (33 Pac., 550).) These rules are based on the equitable doctrine that he who seeks equity must do equity, and are applicable in every case where compliance therewith can be had without injury to the rights of the rescinding party and is essential to the protection of the other party. There are, however, exceptions to the rule as to restoration, also founded on equitable considerations. In *Kelley vs. Owens*, 120 Cal., 502, (47 Pac., 369, 52 Pac., 797), this court recognized the existence of such exceptions in the following language: "There are exceptional cases where restoration or an offer to restore before suit brought is not necessary—as for instance, where the thing received by the plaintiff is of no value whatever to either of the parties; or where the plaintiff has merely received the individual promissory note of the defendant; or where the contract is absolutely void; or where it clearly appears that the defendant could not possibly have been injuriously affected by a failure to

restore; or where, without any fault of plaintiff, there have been peculiar complications which make it impossible for plaintiff to offer full restoration, although the circumstances are such that a court of chancery may by a final decree fully adjust the equities between the parties—and it will be found that such instances, or others similar to them in principle, are those to which the authorities cited by appellants generally relate.’ Some of the cases thus instanced are excepted by the terms of the statute, as in the case where the thing received by the plaintiff is of no value whatever to either party, but others are not. It is settled by our decisions that one attempting to rescind a transaction on the ground of fraud is not required to restore that which, in any event, he would be entitled to retain. (See *Matteson vs. Wagner*, 147 Cal., 739, 743, (82 Pac., 436), and cases there cited). This is upon the theory that the defendant could not possibly have been injuriously affected by the failure to restore, and the plaintiff might be, for he might not be able to again collect the amount from the defendant, if it should be so restored to the defendant. One of the exceptions recognized in *Kelley vs. Owens* is where, without any fault of plaintiff, there have been peculiar complications which make it impossible for plaintiff to offer full restoration, although the circumstances are such that a court of chancery may by a final decree fully adjust the equities between the parties. (See, also, *Thackrah vs. Haas*, 119 U. S., 499, (7 Sup. Ct., 311; *Wills vs. Porter*, 132 Cal., 516, 521, (64 Pac., 896).) Another exception recognized by this

court is that of the case where the taking of an account is necessary for the ascertainment of the sum to be repaid, or the sum is to be liquidated by an adjudication based on evidence of facts independent of the terms of the contract itself. In such a case, as the plaintiff cannot determine in advance of the suit the amount by him to be repaid, an offer to refund such sum as shall be decreed is a sufficient offer to do equity. (*Sutter St. R. R. Co. vs. Baum*, 66 Cal., 44, (4 Pac., 916).) The authorities fully sustain the proposition that an offer to restore before action is not essential where the rights of the other party can be fully protected by the decree, and such restoration cannot be made without injuriously affecting the rights of the party seeking rescission, or the relative rights of the parties in the event of a rescission cannot be determined without an accounting. The statute itself dispenses with the necessity of such an offer where the other party is himself unable to restore what he has received. In such event an offer on the part of the rescinding party would be a vain thing, and the respective rights of the parties can be fully guarded by the decree."

California etc. Co. vs. Schiappa-Pietra, 151 Cal., 732-739-741.

In direct line with these views of the Supreme Court of California we call attention to the following passage from a very recent New York case:

"The *statu quo* doctrine is thus based on the broad principles that one electing to rescind an

existing contract cannot at the same time in effect take the opposite position of affirming the contract by retaining anything of value obtained through it, nor should he be allowed to profit in the same manner by the very fraud he charges against another. Whenever, therefore, the innocent party has obtained under the contract definite property which can be returned upon the rescission of the contract, the *statu quo* doctrine may be strictly and easily applied, but there are obviously many cases in which any such exact and literal return is impossible and it thus becomes necessary to examine the limitations of the doctrine.

“Although the rule states that the guilty party is to be restored to his original position, the reason for the rule as shown is not that any particular regard or consideration is due him, but simply that the attitude of the defrauded party upon bringing his action may conform to basic principles of pleading and equity, and not be open to criticism in these respects, as would be the case if he were allowed to retain property that came into his hands through the very fraudulent instrument that he would seek to avoid. But, if the attitude of the innocent party is not open to the objections mentioned, if he does not possess and so is not seeking to retain anything that would imply an affirmance of the contract or that would be inequitable for him to keep, the reason for the doctrine falls, and the doctrine itself becomes inapplicable. In such case the plaintiff’s right of action is entirely unaffected by any consideration as to whether or not the de-

fendant is or may be put in exact *statu quo*. If he is not or cannot be so placed, he has only himself to blame. An innocent party cannot be in any way prejudiced in his right of action by the fraudulent acts of the other party to the suit. The cases accordingly clearly recognize this important limitation to the *statu quo* doctrine."

Moore vs. Mutual Reserve Fund Life Ass'n.,
106 N. Y. S., 255, 258;

And see, also:

Hammond vs. Pennock, 61 N. Y., 145, 152-4.

And a very clear comment upon the proposition that the rule is inapplicable where the defendant could not have been injuriously affected by the failure to restore, or where conditions proper for the protection of the defendant could be inserted in the judgment ultimately recovered, will be found in *Matteson vs. Wagoner*, 147 Cal., 739, 744, 745, the Court adding that, "Under the prayer for general relief, the Court can give such judgment as plaintiffs show themselves entitled to, and as may be necessary to effect justice between the parties and protect the rights of both." It may be added, in passing, that the authority last cited quite plainly disproves *Marten vs. Burnes Wine Co.*, 99 Cal., 356, one of the authorities cited by counsel upon the other side.

And so, also, in another recent case, it was ob-

served that "if equity can still be done between the parties, courts will grant relief to the defrauded party."

Green vs. Duvergey, 146 Cal., 379, 389-391.

Indeed, it is sufficient if, "upon the trial" a plaintiff should offer to return (*McDonald vs. Pacific Debenture Company*, 146 Cal., 667, 672).

(b). *The doctrine contended for is inapplicable here, because the Standard Portland Cement Corporation could not return something which the Standard Portland Cement Corporation had never received.*

Moore vs. Mutual Reserve Fund Life Assn.,
106 N. Y. S., 255, 258.

Whatever may or may not have been the moral quality of Dingee's conduct with reference to these bonds and stocks, in doing what Young relates without contradiction from counsel, still the question remains, what has that to do with the Standard Corporation? Conceding Dingee's wrong to the fullest extent, still the bonds and stocks never got into the treasury of the Standard, or were received or accepted by it, or ever passed into its possession or under its control. The vice of the contention upon the other side lies in the assumption that a physical receipt by Young, if there was one, is necessarily a receipt by the Standard: but where the facts are as related without contradic-

tion in the testimony of Young, and while Dingee was active in furthering the purpose agreed upon at the meeting of March 25-26, 1908, it cannot, without doing violence to the record, be concluded that these bonds or stocks ever got anywhere except where Young says they got, namely, into the treasury of the N. W. Co. And if these documents passed into the treasury of the N. W. Co., they plainly did not pass into that of the Standard; and the Standard therefore could not return something which the Standard itself had not received.

(c). *The doctrine contended for is inapplicable here for the reason that the alleged securities were of no value to either party.*

Cal. etc. Co. vs. Schiappa-Pietra, 151 Cal., 732, 739.

The discussion heretofore had will throw considerable light upon the suggestion now made; and that discussion exhibits the worthlessness of the bonds and stocks in question to any person whatever. Evans' own conduct, his acute anxiety to get rid of these bonds and stocks, his swift concert in the plan formulated in March, 1908, and his ready acceptance of the unsecured one year note of the Standard in preference to the secured bonds and the stock of the N. W. Co.,—all these things, together with others which manifest themselves throughout the record,

make it very clear indeed that these bonds and stocks were not only of no value to Evans, but were thoroughly understood by him to be of no value. And all of these considerations concur to make it clear that the bonds and stocks were of no value to the Standard Corporation. As Evans knew, and as Dingee knew, and as Howard knew, the North Western enterprise was abandoned: Evans flatly refused to accept Dingee's assurances that the work would go on in the future: the Company was insolvent: its assets were insignificant: its property had been embezzled and misappropriated: all operations at Kendall had ceased: the Standard itself was in a depressed financial condition: how then could the bonds of this insolvent failure be of any value to the Standard? The N. W. Co. was worse than dead, it was rotting: Dingee had stolen right and left: he stole for the Santa Cruz Company: he stole to buy the Bellingham Bay and British Columbia stock, taking the stock in his own name as trustee: and then he stole that stock to make it part of the pledge to the American Bridge Company: and he was thoroughly familiar with the wretched conditions which characterized the North Western Company enterprise. A bond, after all, is nothing more than a promise secured by the assets of the promisor; but of what value to anybody, particularly to the Standard, were the promises of the bonds of such a disastrous fiasco as the N. W. Co. enterprise?

If the value be what an object is worth in money, then who could sell, or who would buy, such worthless things as these North Western bonds or stocks? If value depend in use, then to what uses could these wretched bonds and stocks be put? What sane bank, for instance, would accept them as collateral? What sane trustee would select them as investments for trust funds? Counsel talks about absolute worthlessness: but while we regard these bonds and stocks as absolutely worthless, still there may be a point of view from which nothing in this world, however worthless otherwise, is absolutely worthless. In other words, value, if it have any meaning, must mean available value. These bonds and stocks are not worthless as pipe-lights. A man might twist up one of these bonds, stick it into the fireplace, and light his pipe with it: it might not be worthless for that purpose. If some one threw a rock through my window, I might paste one of these bonds over the hole in the windowpane and thus keep out the draft: the bonds or certificates of stock might not be worthless for that purpose. And in this way it might be said that there is no such thing as absolute worthlessness. But for all reasonable, practical, business purposes, a thing may be entirely worthless, although it might be utilized as a pipe-light or a stop-gap in the window. Value, in other words, must mean available value, in a reasonable, practical, business sense. Let us illustrate our meaning by reference to an actual condition of fact

which is to be found in the Federal Reporter. In the case of *Pepper vs. Addicks*, 153 Fed., 383, it was held that where the defendant, an officer and director of a corporation, absolutely dominated its Board of Directors, and induced such Board to authorize the purchase of worthless bonds of other corporations in which he was interested, by which he was enabled to make a large individual profit, he became liable to the operation of certain well known equitable doctrines. Now, in this case, the bonds were determined by the learned Judge who decided the cause, to be worthless: what then was the learned Judge's conception of worthless bonds? We think it will be sufficient for our purposes to extract from the decision in question, and present the same in parallel columns, the points of resemblance between the worthless bonds there, and the worthless bonds here.

QUEEN CITY GAS LIGHT
COMPANY.

NORTH WESTERN PORT-
LAND CEMENT COMPANY.

Incorporated: February
15, 1893.

Capital stock: \$50,000.

Number of shares: 500.

Par Value: \$100.

Purpose: Manufacture
and Sale of Gas.

Place: Buffalo, New
York.

Incorporated: August 27,
1906.

Capital stock: \$5,000,000.

Number of shares: 50,000.

Par Value: \$100.

Purpose: Manufacture
and Sale of Cement.

Place: Kendall, Washing-
ton.

Plant Built: 1897.

Cost of Plant: \$180,000.

Amount of Business: Very Little.

Bond Issue: \$1,000,000.

Security: Very Little.

Value of Bonds:

Plant Built: Never built.

Cost of Plant: \$58,800.

Amount of Business: None.

Bond Issue: \$2,000,000.

Security: Very Little.

“It did a little business,
 “but never paid operating
 “expenses, and it had
 “very little of value to
 “offer as security for an
 “encumbrance of \$1,000,-
 “000. No one would
 “have taken the bonds,
 “except as a venturesome
 “speculation, or as part
 “of a scheme which con-
 “templated further steps
 “before success should be
 “attained. The purchase
 “of \$1,000,000 of such
 “bonds at par, standing
 “by itself, would be an
 “act either reckless in the
 “extreme, or suggesting
 “combination for some
 “purpose between the
 “buyer and the seller”
 (page 386).

Passing to the other corporation involved in the *Addicks* case, we have the following significant exposures:

PEOPLE'S GASLIGHT AND COKE COMPANY.	NORTH WESTERN PORT- LAND CEMENT COMPANY.
Incorporated: November 2, 1897.	Incorporated: August 27, 1906.
Capital Stock: \$3,000,000.	Capital Stock: \$5,000,000.
Purpose: Manufacture and Sale of Gas.	Purpose: Manufacture and Sale of Cement.
Place: Buffalo, New York.	Place: Kendall, Washing- ton.
Cost of Plant: \$500,000.	Cost of Plant: \$58,800.
Gross Earnings: Nine Months: \$4,223.36.	Gross Earnings: Any Number of <i>Months</i> : Nothing.
Only moneys Received by Company: Proceeds of Bond Issue.	Only moneys Received by Company: Proceeds of Bond Issue.
Bond Issue: \$2,100,000.	Bond Issue: \$2,000,000.
Security for Bonds: Plant and Franchise of People's Gaslight and Coke Company and of Queen City Gas Light Company, the two plants aggregating: \$680,000.	Security for Bonds: Present and after-ac- quired property of Company.
Value of Bonds: "These bonds had little	

"intrinsic value. The
 "issue was \$2,100,000, and
 "the plant and other
 "property back of them
 "was not worth one-third
 "of this sum, even if ap-
 "praised as worth all the
 "money that had been put
 "into the enterprise. Con-
 "sidering the property as
 "income producing and
 "as security for an in-
 "vestment, it would not
 "bear investigation for a
 "moment. It was purely
 "a speculative scheme,
 "and except in this as-
 "pect, its bonds were
 "worthless" (p. 396).

And we know that Mr.
 Evans did not go into the
 North Western as "purely
 "speculative scheme:" as
 he says himself "I sub-
 "scribed my money for
 "legitimate commercial
 "purposes."

It may be observed, in passing, that Evans under-
 takes to tell us (Record, Vol. I, p. 193) that the North
 Western bonds were worth more than the Standard
 notes: but of course, this dress-parade statement is
 contradicted, not only by the whole history of the
 case, and by Evans' own conduct and demeanor in
 and about these bonds, but also by the declarations

of Howard himself. There was, plainly, no other consideration for the notes in suit except the bonds and stock, and since they were wholly worthless, the rule contended for would be wholly inapplicable (*Field vs. Austin*, 131 Cal., 379).

(d) *The rule contended for is inapplicable here because it clearly appears that neither Evans nor his assignors could possibly have been injuriously affected by a failure to restore.*

California etc. Co. vs. Schiappa-Pietra, 151 Cal., 732, 739, *ad finem*.

Of course, the record here makes no attempt to show that either Evans or his assignors have been in any way injuriously affected by any failure upon the part of the Standard Corporation to return the bonds and stocks in question, assuming that the Corporation ever had those bonds and stocks in its possession so that it could return the same. Indeed, it would have been the climax of absurdity had Evans or his assignors attempted any such thing. Had any interest been paid upon these bonds, had these stocks earned any dividends, had the N. W. Co. any productiveness, which, by a failure to return, Evans or his assignors were deprived of, one might understand the claim that they were injuriously affected by the failure to return: but the entire history of the N. W. Co. has been one long shocking story of loot,

embezzlement, spoliation and dishonesty. It never earned a dollar: it never declared a dividend: it never turned out a pound of cement: it never was in a position where it could turn out a pound of cement or earn a single dollar: it was a pronounced and unqualified failure; and had Mr. Evans and his assignors never entered into the preconcerted arrangement of March, 1908, and had they continuously retained in their possession these bonds and stocks, their position would have remained precisely the same. The compelling facts which are disclosed by the record in this cause make it entirely clear that, assuming that the Standard Corporation ever received the bonds and stocks in question, no failure to return the same could in any way have injuriously affected Evans or his assignors.

(e). *The rule contended for is inapplicable here because without any fault on the part of the Standard, there have been peculiar complications which make it impossible for the Standard to restore.*

California, etc. Co. vs. Schiappa-Pietra, 151 Cal., 732, 739-740.

These matters have already heretofore been discussed in pointing out that by reason of a combination of acts by Evans, Norcross and Dingee, the bonds and stocks in question never got into the treasury of the Standard, but passed into that of the North Western. Whether those bonds and stocks be treated as in the

treasury of the N. W. Co., or as in the possession of Mr. Young as bailee for whomsoever the law shall declare to be their owner, matters but little so far as the Standard Corporation is concerned: however, these things may or may not be, those bonds and stocks are not in the possession or in the treasury of the Standard Corporation.

(f.) *The rule contended for is inapplicable here because under the circumstances a Court of Chancery may by a final decree fully adjust the equities between the parties.*

Cal. etc. Co. vs. Schiappa-Pietra, 151 Cal., 732, 740.

In this connection, it may be pointed out that the relief allowed in equity is determined by the situation presented to the Chancellor at the time of the decree, not at the beginning of the litigation. In other words, the status of the cause and the parties, at the date of the institution of the suit, does not control the Court, but that the Court is controlled by the status of the case and the parties at the time of the decree.

Superior Oil & Gas Co. vs. Mehlin, 108 Pac., 545, 547.

Little vs. Cunningham, 92 S. W. (Mo.), 734, 736.

In view of these principles, it may be said that if,

notwithstanding our construction of the facts, it should be judicially determined that the bonds and stocks in question are actually in the possession of the Standard Corporation, then the Standard Corporation would be in a position to return those bonds and stocks to Evans and his assignors. Should this condition of things develop, the Standard Corporation will then restore and redeliver to Evans and his assignors the bonds and stock in question. Under all the authorities, this may be done at any time prior to the actual entry of the decree.

(g) *The doctrine contended for is inapplicable here for the reason that the notes sued on are absolutely void.*

California etc. Co. vs. Schiappa-Pietra, 151 Cal., 732, 739, ad finem.

And we insist that the contracts, so-called, involved in this cause are absolutely void:

1. Because of the antagonism of the alleged notes to settled public policy;
2. Because said notes are entirely without consideration;
3. Because there never was any real delivery of said note, to said Corporation;
4. Because said notes were and are the progeny of

a corporate fraud participated in by the persons now seeking to enforce them.

It is highly important to observe that these alleged notes are void, because the public policy of this State does not permit notes tainted with illegality to furnish the basis for a recovery. From the record here, it must, we think, be obvious that these Howard bondholders entered into the Kendall project with very great expectations: that they expected not alone an acceptable investment in the bonds, but also a profitable speculation through the acquisition of the bonus stock: that they looked upon Dingee in the beginning as the coming man in the cement enterprise—as the future cement king of the Pacific coast: that they looked forward to the acquisition of the Northern cement market by the new concern; and that they glowed with hopes for the future, and were only too willing to take the bonds and acquire the bonus stock. But a change came over the spirit of their somewhat iridescent dream: there came the failure to make progress at Kendall: there came evil tales of the failure to pay men starving at Kendall: there came ominous talk about the imposition of liens: Dingee had been looting the North Western funds and stealing them for alien purposes: the air was filled with the complaints of the bondholders: letters were sent to Dingee proposing the return of the bondholders' money, but these letters were ignored by him: then

came the Wenzelburger investigation; and this revealed the full extent of Dingee's embezzlement. Can any reasonable man doubt the effect of all these things upon the minds of the bondholders? Taking Evans as a typical illustration, is it at all surprising that he should become "very sore"? Did he not lose all confidence in Dingee, and refuse to accept Dingee's assurances that the work would go on at Kendall? Did he not think it best to get rid of these bonds? The bondholders never stopped to chaffer about the stock of that decrepit jerkwater concern known as the Bellingham Bay & British Columbia Railway, or about claims by the North Western Company against any other person or corporation: they knew that the railway was controlled only to be sold, that Howard did not wish it to be encumbered by a burdensome cement contract which might make it unattractive to prospective purchasers, and that all the moneys used by Dingee for its purchase were never directed by the Company to be diverted into any such channels; and what they looked at were not the specious afterthoughts conjured up by counsel to meet the exigencies of this case, but what they looked at was that failure at Kendall which sent glimmering their stock speculation, and which stripped their bonds of value. Is one then to wonder that they became "very sore," and that their minds were charged with thoughts of Dingee's criminal responsibility?

In illustration of this, consider Evans' attitude dur-

ing the months of January, February and March, 1908. In January, 1908, he writes this significant language to Howard:

"I regret that I shall be unable to get away from here before 22nd proximo, and it is doubtful if I shall be able to get away then, but I intend going to San Francisco as soon as I possibly can, when, if I get no satisfaction in the meantime, I intend to get some satisfaction out of Mr. Dingee, even if I have to go to the expense and worry of getting it through the courts" (Letter January 29, 1908: Record, Vol. II, p. 537).

And again, in February, 1908, he lets in the light upon what was in his mind, in the following passage:

"I duly received your favor of the 4th inst., and note all you write with regard to North Western Portland Cement Company. It seems to me that there should be no delay in bringing this matter to a head, and what I would suggest is, that you call all your friends together, to whom you sold the bonds, and tell them frankly what your suspicions are, and arrange for some lawyer to go ahead on their behalf, on the understanding that they contribute pro rata to the expense according to their holdings of bonds. If Mr. Dingee has used the money other than for the purposes for which it was subscribed, I take it that he is criminally liable that he should either be made to refund the money without delay, or failing this, criminally prosecuted" (Letter February 10, 1908: Record, Vol. II, p. 546).

And again, in March, 1908, he recurs to the subject in the following language:

"I duly received yours of 27th ultimo enclosing Certificate No. 196 for 150 shares in the North Western Portland Cement Company, endorsed by Mr. A. Wenzelburger, together with copy of this gentleman's report. I have had no time to thoroughly go into same, but the first glance shows me that my suspicions are more than confirmed, and that Mesrs. Dingee and Bachman have been using the money for their own personal benefit, and according to the laws of this country are criminally liable, and if they were here, they would either have to make the money good within 48 hours, or they would be arrested" (Letter March 4, 1908: Record, Vol. II, p. 549-550).

And this is the letter which Howard transmitted from New York to Dingee in San Francisco, thus communicating to the man who had done the wrong, and who well knew he had done the wrong, the state of mind of the man whom he had wronged.

And so, too, the same thought permeated Percy's mind; and Ernest had no secrets from Percy, as we have seen. And Percy, as late as February, 1909, expresses his views in the following passage:

"Of course, I am very anxious to know how you are getting on with that unfortunate Dingee affair. I did hear indirectly that you had secured a mortgage on his property near Redwood City, and if

such is the case, I suppose we can consider ourselves amply secured; if you have not, then I for one would be in favor of pushing Dingee to the utmost point, even going so far as to put him in jail if it were possible, and I know my partners feel the same way. Surely something can be done at once on account of delinquent interest" (Letter February 8, 1909: Record, Vol. III, p. 895).

And Howard's explanations throw further light upon the state of Evans' mind: he holds out hopes to Evans: he admits the "wrong;" and he concedes the inadequacy of the investment at Kendall.

Of course, at this time, Dingee was in no position to encounter a criminal prosecution, and a criminal prosecution would merely have precipitated his ruin: he was then a fiduciary of the North Western, the Santa Cruz and the Standard corporations: he was a financial wreck: he was in a state of great mental disturbance, distress and great mental anxiety: he was carrying a very heavy load and needed time, and his governing desire was to conciliate Howard and to placate the Howard bondholders.

Now, if the consideration for a note were contrary to public policy, or illegal, that note could not be made the basis of any action legal or equitable; and it would be the duty of the Court, upon the illegality appearing, to withhold all relief; and neither the silence nor the consent of the parties would justify the Court in retaining jurisdiction of such an action.

Ball vs. Putnam, 123 Cal., 134;

Union Collection Co. vs. Bickman, 150 Id.,
159, 165;

Prost vs. More, 40 Id., 347;

Morrill vs. Nightengale, 93 Id., 452;

Leonis vs. Walsh, 140 Id., 175.

The doctrines of estoppel, laches, ratification and the like, have no application to a contract void because in violation of public policy, or because illegal, because such a contract has no legal existence, no action or inaction of a party to it can validate it, and no conduct of a party to it can be invoked as an estoppel against asserting its invalidity. While the courts will not aid either party to an illegal transaction where they stand in *pari delicto*, still this rule applies only where the parties thus stand, or, in other words, where the illegal transaction is entered into voluntarily and the turpitude of the parties is mutual; but where the party seeking relief was not a free moral agent, and its apparent consent to the illegal transaction was obtained through pressure or control, it cannot be regarded as in *pari delicto* with those who obtained its apparent consent by the employment of such means, and it will not be precluded from invoking affirmative relief in equity to set aside the contract, or from defeating the attempted enforcement thereof. That Dingee criminally misappropriated the funds of the North Western Portland Cement Company, is a postulate in

this cause: and if these Howard bondholders, well knowing this from Wenzelburger's report and other sources, instead of prosecuting him therefor, took advantage of his distress to approach him with suggestions of his criminal liability and prosecution upon their lips, and with the keys of the penitentiary jingling in their pockets and, actuated by a selfish and personal motive, treated with him for their own advantage until they succeeded in having the consequences of his sins transferred to an innocent corporation by the enforced issuance of its notes, could any just man claim legality for such a transaction, or seriously assert that it be validated by any process of estoppel, laches, ratification or the like? Dingee was made to understand that if he did not take up these bonds, depreciated by his derelictions, by putting the burden of paying for them at par and with accumulated interest upon a disconnected and innocent corporation at that time under his control, then he should not be surprised at any course the bondholders might take; and these bondholders not merely insinuated but said that they held in their hands the means of prosecuting him criminally. But we take it to be the law, as dictated by the soundest considerations of policy and morality, that you shall not make a trade of a felony. If you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself. But that was the real position in which these bondholders stood. They

knew full well that they had before them, in the person of Dingee, the despoiler of the funds of the North Western Portland Cement Company; and they converted that fact into a source of benefit to themselves by compelling him to compel the Standard Corporation to issue the notes in question; and if these men are permitted to trade upon their knowledge of Dingee's wrongdoing and to convert his wrongdoing into an occasion of an advantage to themselves, no greater legal or moral offense could be committed.

A leading case upon the subject, and one very frequently cited by courts and text writers is the case of *Williams vs. Bayley*, L. R., 1 H. L., 200; and the reasoning upon which the decision is based is so clear and cogent, that we take the liberty of setting it forth somewhat at length.

It was an appeal from a decision by which certain agreements were declared void. A son carried to bankers of whom he, as well as his father, was a customer, certain promissory notes with his father's name upon them as endorser. These endorsements were forgeries. On one occasion the father's attention was called to the fact that a promissory note of the son, with the father's name on it, was lying at the bank dishonored. He seemed to have communicated the fact to the son, who immediately redeemed it; but there was no direct evidence to show whether the father did or did not really understand the nature of the transaction. The fact of the forgery was after-

wards discovered; the son did not deny it; the bankers insisted, though *without any direct threat of a prosecution*, on a settlement to which the father was to be a party. He consented, and executed an agreement to make an equitable mortgage of his property. The notes, with the forged endorsements, were then delivered up to him.

A decree of the Vice Chancellor declaring the agreements void was affirmed. The opinion of Lord Chancellor Cranworth, after referring to the principal facts in the case, drew therefrom certain conclusions which seem to us very applicable here. The Lord Chancellor said (p. 209):

“If the signatures were forgeries, then the bankers were in this position: that they had the means of prosecuting the son. That was clear. Now, the question is, what was the sort of influence which they exercised on the mind of the father to induce him to take on himself the responsibility of paying these notes? Was it merely, we do not know these to be forgeries, we do not believe them to be so, but your son is responsible for them, and if you do not help him we must sue him for the amount? Or was it, if you do not pay these notes we shall be in a position to prosecute him for forgery, and we will prosecute him for forgery? What is the fair inference from what took place? . . . I do not know what may be the opinion of the rest of your Lordships, but I very much agree with the argument of Sir Hugh Cairns of

counsel for appellants, that it is not pressure in the sense in which a Court of equity sets aside transactions on account of pressure, if the pressure is merely this: 'If you do not do such and such an act, I shall reserve all my legal rights, whether against yourself or against your son.' If it had only been, 'If you do not take on yourself the debt of your son, we must sue you for it,' I cannot think that that amounts to pressure, when parties are at arms' length, and particularly when, as in this case, the party supposed to be influenced by pressure had the assistance of his solicitor, not, indeed, on the first occasion, by afterwards, before anything was done. But if what really takes place is this: If you do not assist your son, by taking on yourself the payment of these bills and notes on which there are signatures which are said, at least, to be forgeries, you must not be surprised at any course we shall take; meaning to insinuate, if not to say, we shall hold in our hands the means of criminally prosecuting him for forgery. *I say, if it amounts to that, it is a very different thing.*"

The Lord Chancellor then, after reviewing in detail a number of the conversations and incidents in connection with the transaction, proceeds to say:

"Is that, or is it not, legal? In my opinion I am bound to go to the length of saying that I do not think it is legal. I do not think a transaction of that sort would have been legal even if, instead of being forced on the father, it had been proposed by him and adopted by the bankers. . . .

Now, is the agreement in question, or is it not, one the object of which is to stifle a criminal prosecution? If there be any case in which that character can properly be given to an agreement, I think that this is such a case, and therefore, in my opinion, the decree is perfectly right. . . . I have therefore no hesitation in moving your Lordships that this appeal be dismissed with costs, and that the decree be affirmed."

In the concurring opinion of Lord Westbury, it is said (p. 216):

"There are two aspects of this case, or rather two points of view, in which it may be regarded. One of them is: Was the plaintiff a free and voluntary agent, or did he give the security in question under undue pressure exerted by the defendants? That regards the case with respect to the plaintiff alone. The second question regards the case with reference to the defendants alone. Was the transaction, taken independently of the question of pressure, an illegal one, as being contrary to the settled rules and principles of law?"

The opinion then, after reviewing and commenting upon some of the salient facts of the case pertinent to the inquiry, continues (p. 218):

"The question, therefore, my Lords, is whether a father appealed to under such circumstances, to take upon himself an amount of civil liability, with the knowledge that, unless he does so, his son

will be exposed to a criminal prosecution, with the certainty of conviction, can be regarded as a free and voluntary agent? *I have no hesitation in saying that no man is safe, or ought to be safe, who takes a security for the debt of a felon, from the father of the felon, under such circumstances.* A contract to give security for the debt of another, *which is a contract without consideration*, is, above all things, a contract that should be based upon the free and voluntary agency of the individual who enters into it. But it is clear that the power of considering whether he ought to do it or not, whether it is prudent to do it or not, is altogether taken away from a father who is brought into the situation of either refusing, and leaving his son in that perilous condition, or of taking on himself the amount of that civil obligation.

"I have, therefore, in that view of the case, no difficulty in saying that, as far as my opinion is concerned, the security given for the debt of the son by the father under such circumstances, was not the security of a man who acted with that freedom and power of deliberation that must, undoubtedly, be considered as necessary to validate a transaction of such a description."

The opinion then proceeds to consider the other aspect of the case: "Was the transaction, regarded independently of pressure, an illegal one, as being "contrary to the settled rules and principles of law?" On this point the distinguished jurist says (p. 219):

"Now I concur in a good deal that was said

by the learned counsel for the appellants, namely, that *if there be an existing debt*, to which is super-added an independent security, or if there be a valid legal document in existence, and then a transaction which is open to the charge of forgery, the contract touching the existing debt is not affected by the superadded engagement which may be invalid on the ground of forgery. For example, if I have lent a man £10,000 on the security of an insufficient estate, and he, some time afterwards, brings me a bill of exchange with a forged acceptance, to induce me to forego exercising my right with respect to the mortgage, that mortgage will not be affected by the forgery, and, I may abstain from dealing with the forgery, and, nevertheless, pursue my remedies on the original contract. *But this is not a case where the bankers are proceeding as against the person liable to them on a contract independent of the forgery. We must take the nature of the contract from the agreement which was entered into, the original agreement, written at the moment*, which no doubt clearly expresses what was in the mind of the father. The liability of the father is created in this memorandum, in which, addressing the bankers, the father says: 'In consideration of your consenting to give up to me the several undermentioned bills and promissory notes, I hereby charge my colliery.' It is impossible, therefore, to have any hesitation as to the fact that the liability of the father is obtained entirely by the consideration of the bankers delivering up the acceptance. That is a wholly different

case from the one to which I have referred, as put in the argument at the bar.

“Now such being the nature of the transaction, I apprehend the law to be this, and unquestionably it is a law dictated by *the soundest considerations of policy and morality: that you shall not make a trade of a felony. If you are aware that a crime had been committed, you shall not convert that crime into a source of profit or benefit to yourself.* But that is the question in which those bankers stood. They knew well, for they had before them the confessing criminal, that forgeries had been committed by the son, and they converted that fact into a source of benefit to themselves by getting the security of the father. Now that is the principle of the law and the policy of the law, and it is dictated by the highest considerations. If men were permitted to trade upon the knowledge of a crime, and to convert their privity to that crime into an occasion of advantage, no doubt a great legal and a great moral offense would be committed. And that is what I apprehend the old rule of law intended to convey when it embodied the principle under words which have now somewhat passed into desuetude, namely, ‘misprision of felony.’ That was a case when a man, instead of performing his public duty and giving information to the public authorities of a crime that he was aware of, concealed his knowledge, and, farther, converted it into a source of emolument to himself.

“It is impossible, therefore, if you look at this matter wholly independently of the question of pressure, and confine your attention to the act of

the bankers alone, not to come to the conclusion that a great *delictum* was committed when the transaction is viewed simply with reference to the course which they took. . . .

“My Lords, I regard this as a transaction which must necessarily, for purposes of public utility, be stamped with invalidity, because it is one which undoubtedly, in the first place, is a departure from what ought to be the principles of fair dealing between man and man, and it is also one which, if such transactions existed to any considerable extent, would be found productive of great injury and mischief to the community. I think, therefore, that the decree which has been made in this case is a perfectly correct decree.

“I do not mean for one single moment, by anything I have said, to cast any imputation on the character of these gentlemen. I am only dealing with abstract principles of law. They might, perhaps, fairly have thought that they were doing the best for the family of Mr. William Bayley and for the father. I beg particularly that it may not be understood that I mean to convey, by any words that I have used, any reproach on their character. I have used those words as necessary to vindicate the policy and justice of the rule of law, and to show how highly requisite it is that a court of equity should undo a transaction such as this, whether it is regarded as proceeding from a father who cannot be considered as a voluntary agent, or, taking the other aspect of it, as violating the rules of law which prescribe the duties of individuals under such circumstances. On both of

these grounds I think that this is a transaction which ought to be set aside."

The doctrine of this case is thoroughly supported by many well considered authorities, some of which may here be cited:

Colby vs. Title Insurance & Trust Co., 160 Cal., 632;

Morrill vs. Nightingale, 93 Id., 452;

Allen vs. Leflore County, 31 So. (Miss.), 815;

Koons vs. Vancousant, 95 A. S. R. (Mich.), 438;

Gray vs. Freeman, 84 S. W. (Tex.), 1105;

Schoener vs. Lessauer, 13 N. E. (N. Y.), 741;

Bryant vs. Peck, 28 N. E. (Mass.), 678;

Bell vs. Campbell, 45 A. S. R. (Mo.), 505.

On the proposition that express threats of criminal prosecution are unnecessary, see:

Meech vs. Lee, 46 N. W. (Mich.), 383;

Paris vs. Carmody, 131 Mass., 51;

Foley vs. Greene, 51 Am. Rep. (R. I.), 419;

Benedict vs. Roome, 64 N. W. (Mich.), 193.

And upon the proposition that where a contract is illegal on account of involving the commission of a crime, the doctrines of estoppel, laches, ratification and the like are not applicable, see:

Colby vs. Title Ins. & Trust Co., 160 Cal., 632;
Robinson vs. Patterson, 39 N. E. (Mich.), 21,
 24;

Hardy vs. Smith, 136 Mass., 328;

Langan vs. Sankey, 7 N. W. (Iowa), 393;

Wheeler vs. Wheeler, 5 Lansing (N. Y.), 355;

Brown vs. First National Bank, 24 L. R. A.,
 206;

Standard vs. Sampson, 99 Pacific (Okla.), 796;

*McCormick Harvesting Machine Co. vs. Mil-
 ler*, 74 N. W. (Neb.), 1061;

Brook vs. Hook, L. R. 6 Exch., 89;

Henry vs. State Bank, 107 N. W. (Ia.), 1034.

The upshot of the whole matter:

The upshot of the whole matter is that the complainant here, an independent corporation then under the control of that faithless fiduciary of the N. W. Co. whom the agent of the malcontent bondholders had privately interviewed and arranged a plan with, regardless of directors or stockholders,—an independent corporation which had never had any prior relations with the N. W. Co., which had never before or since purchased a bond or share of stock of the N. W. Co., and which was itself then in a financially depressed condition,—this independent corporation, then controlled by the faithless fiduciary who was himself combing the highways for money, at a special meeting of the puppets of the trust-betrayer, and as

the result of an antecedent agreement made with the malcontent bondholders of the other corporation, is made to obligate itself, without consideration, and without any corporate occasion or necessity to justify the sacrifice, for the bonds at par with accrued interest, of an abandoned enterprise,—bonds that it had no rational use for, bonds upon which it could not raise a dollar, bonds that no sane bank would accept as collateral, bonds that no trustee would dare invest trust funds in, bonds that were wholly powerless and inadequate to suppress adverse northern competition, bonds that could not be utilized for any honest business purpose.

And those who participated in and expect to profit by this scheme are here asking a court of justice to aid them to realize the fruits of the preconcerted plan between them and Dingee whereby in effect,—and there can be no masking it,—the Standard should be sacrificed as a holocaust for the delinquencies of Dingee and the disappointed expectations of these bondholders, in a totally different and disconnected corporation; and the central problem which presents itself for solution is whether, under all the facts and the reasonable inferences therefrom, this attitude of these bondholders, who care nothing for the Standard except as it may be a convenient instrument to enable them to recoup their losses elsewhere, is equitable or inequitable. Will that commercial morality be recognized in a court of justice which would permit the

Howard bondholders to reprobate Dingee's wrongful conduct towards the N. W. Co. which injures them, but approbate Dingee's equally wrongful conduct towards the Standard which benefits them? They complained, and were very swift and persistent in their complaints, against Dingee for his wrongdoing in the affairs of the N. W. Co.: but when that same faithless fiduciary betrays, with their antecedent knowledge and concurrence, a second corporation, to their and his advantage, a change falls upon the spirit of their selfish dream: what was wrong in the one case becomes the purest ethics in the other: what was a corporate wrong in the one case becomes a corporate blessing in the other: prominent among those principles of elevated morality which are supposed to form the essence of equity, we are to meet this, that it is equitable to run with the hare and hunt with the hounds, and that it matters nothing what wrong may be done the Standard, provided the unwelcome bonds are got rid of, and we get our money.

But: May an individual in control of two different corporations, of the first of which he was so unfaithful a trustee as to compel abandonment of the enterprise, be so wrought upon by its malcontent bondholders, and by his own consciousness of wrongdoing and the consequences thereof, that he becomes as faithless to the second as he was to the first? May such malcontent bondholders carry to a successful conclusion a scheme bottomed upon this very faithlessness, which

had their full knowledge and willing concurrence? Will a court of justice say nothing to that? Will a court of justice permit willing debauchers of corporate fiduciaries to profit by the very breach of duty which they have participated in bringing about? Is any court willing that the innocent should suffer so that the guilty may escape, and escape profitably? Will any preconcerted plan receive judicial approval which permits the wrongdoing of Dingee, and the consequent failure and abandonment of the N. W. Co. enterprise, and the consequences thereof, to be compensated by the sacrifice of the Standard,—the sacrifice of an innocent corporation to the personal purposes of interested parties, to Dingee's desire to get Evans off his back and secure personal immunity from unpleasant consequences including probable criminal prosecution, and to the inequitable greed of disappointed bondholders anxious to get rid of what they knew to be worthless bonds and to get their money back? Can it be possible that the transfer of Dingee's burdens to an independent corporation,—that the imposition upon an innocent corporation of the consequences of his antecedent and disconnected corporate treachery,—all done pursuant to a preconcerted arrangement made long before, without notice to or consultation with either directors or stockholders, and all done with the aid of confederating puppets and by a sham sale,—can it be possible that so gross a cor-

porate fraud as this can be rescued from judicial condemnation?

No common law judge, no chancellor who ever sat in an equity case, has ever approved the repulsive doctrine that it is legally right or equitable that the innocent should suffer: but how is it possible to make the suffering of the innocent any justification for a finding in favor of those who consciously and knowingly participated and concurred in bringing about that very suffering of the innocent of which we here complain and against which we here protest? Why should these Howard bondholders be willing to let this innocent Standard Corporation suffer, so that their bad investment in another company might be retrieved? Does not this very willingness demonstrate that they are utterly unworthy of the sacrifice? Surely, no common law judge, no chancellor, ever awarded recognition to a suitor who would consent that an innocent person should suffer for his mishaps or bad investments. What, indeed, would we think of a man who would allow another to die for a crime of which he knew him to be innocent? What would we think of an equitable principle which allowed the innocent to take the place of the guilty? Is it possible to vindicate any principle of law or of equity by inflicting punishment upon the innocent? Would not such procedure as that be a renewed violation of legal principles rather than a vindication of them?

No principle known to our jurisprudence calls for

a finding in favor of the wrong person: if a man violates legal principles, those principles demand *his* punishment, not that of a substitute; and, indeed, there can be no law, human or divine, that can be satisfied by the punishment of a substitute. There cannot be, nor is there, any principle of right which demands that the guilty be rewarded; and yet, to reward the guilty is far nearer justice than to punish the innocent.

Respectfully submitted.

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